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Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
FIRST AND SECOND INTERIM REPORTS
OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT

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July 2, 1992

BEST AVAILABLE COPY

147 pp

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OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

1. The State of Wyoming excepts to the Special Master's recommended denial of the Motion of the State of Wyoming for Summary Judgment dated September 11, 1987 and the Wyoming Second Motion for Summary Judgment dated February 22, 1991. First Interim Report at 16; March 2, 1989 Order at 3 (Docket No. 119); Second Interim Report at 110. Specifically, Wyoming excepts to the Special Master's failure to recommend summary judgment

   a) that the measure and the limit of Nebraska's apportionment under the Decree are the water

requirements of the Nebraska canals in the Guernsey Dam to Tri-State Dam section of the North Platte River;

b) that Nebraska's claims of violation of the Decree should be denied to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam;

c) that Nebraska has failed to produce sufficient facts to warrant a trial on her claims that construction and operation of Deer Creek Reservoir would violate the Decree or require the imposition of new injunctions;

d) that municipal use of Deer Creek Reservoir is exempt from restriction under the Decree;

e) that the Inland Lakes have no priority for storage of natural flow under state law or the Decree;

f) that the Laramie River was excluded from Nebraska's apportionment in the Decree and that, therefore, Nebraska's allegations that Grayrocks Reservoir or the proposed Corn Creek Project would violate the Decree should be denied as a matter of law.

2. The State of Wyoming excepts to the Special Master's recommendation that the Court grant "Nebraska's motion for summary judgment that the Inland Lakes in Nebraska have a priority right of December 6, 1904, to store at least 46,000 acre feet of water during the months of October, November, and April..." Second Interim Report at 109.

3. The State of Wyoming excepts to the Special Master's recommendation that the Court grant "[t]he United States' motion for summary judgment that the Interstate Canal in Wyoming has a priority right of December 6, 1904, to divert natural flow in the North Platte River for storage in the Inland Lakes, and that the Guernsey and Glendo Reservoirs have the right to store water temporarily before transfer to the Inland Lakes . . ." Second Interim Report at 109.

4. The State of Wyoming excepts to the Special Master's recommendation that the Court amend the Decree to add a new paragraph XVIII imposing an injunction on the State of Wyoming to effectuate the summary judgment recommended by the Special Master with respect to the Inland Lakes. Second Interim Report at 110.

5. The State of Wyoming excepts to the Special Master's denial of Wyoming's September 19, 1988 Motion to Strike Affidavits (First Interim Report at 17 n.35; March 2, 1989 Order at 2-3 (Docket No. 119)) to the extent that the Special Master then relied on affidavits challenged by that motion in recommending final resolution of the Inland Lakes issue without a trial.

6. The State of Wyoming excepts to the Special Master's recommendation that the Court grant Nebraska's partial summary judgment motion "that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis . . ." Second Interim Report at 109.

7. The State of Wyoming excepts to the Special Master's recommendation that the Court amend paragraph

XIII of the Decree to add a new subsection (g) that would authorize an action by Nebraska in the original jurisdiction of the Supreme Court in order to enforce an agreement between Nebraska and Basin Electric Power Cooperative. Second Interim Report at 110.

Respectfully submitted,

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UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

WYOMING BRIEF IN SUPPORT OF EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

QUESTIONS PRESENTED

This matter is before the Court on exceptions to two reports of the Special Master recommending disposition of motions for summary judgment which raise the following issues:

A. Whether the measure and limit of Nebraska's apportionment under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981

(1953), are the water requirements previously determined by the Court for Nebraska's irrigation canals diverting at and upstream of Tri-State Dam.

B. Whether Nebraska's apportionment under the Decree extends to uses supplied by diversions below Tri-State Dam.

C. Whether Nebraska is entitled to a trial on her claim that the construction and operation of the proposed Deer Creek Reservoir in Wyoming would violate the Decree or require the imposition of new injunctions.

D. Whether Paragraph X of the Decree exempts municipal uses of Deer Creek Reservoir from restriction under the Decree.

E. Whether the Inland Lakes have a priority for storage under state law or the Decree.

F. Whether the 1945 Decree excluded the Laramie River and, if so, whether Nebraska's claims that the existing Grayrocks Reservoir and the proposed Corn Creek Project violate Nebraska's apportionment under the Decree should be denied as a matter of law.

JURISDICTION

The State of Nebraska invoked the retained jurisdiction of this Court to enforce the October 8, 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665, 671-72 (1945). The Decree, which apportioned the waters of the North Platte River among the States of Nebraska, Wyoming and Colorado, was entered in a proceeding under Article III, §2, Clause 2 of the U.S. Constitution and the Judiciary Act, 28 U.S.C. §1251(a) (1990).

STATEMENT OF THE CASE

I. *NATURE OF THE CASE*

The State of Nebraska brought this action against the State of Wyoming to enjoin alleged violations of the interstate apportionment of the North Platte River under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).[1] The Nebraska petition accepted for filing in the present case does not seek to modify, enlarge or otherwise change the apportionment effected by the Decree.[2]

Nebraska's petition accuses Wyoming of violating or threatening to violate Nebraska's apportionment established in the Decree by the following actions:

> (a) Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> (b) Depleting the flows of the North Platte River by the proposed construction of additional

1. As used in this brief, "the Decree" or "North Platte Decree" refers to the decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *as modified*, 345 U.S. 981 (1953). The litigation that resulted in that opinion and decree will sometimes be referred to as *"Nebraska v. Wyoming (I)"* or "the original proceeding". The Decree is reproduced as Appendix A-2 to A-10 of this brief and for convenience will be cited by reference to the paragraph number of the Decree.
2. In 1988 the Court denied Nebraska leave to amend her petition to seek a modification of the apportionment. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). Nebraska recently filed a second motion to amend her petition to pray for an apportionment of non-irrigation season flows which Nebraska argues were not apportioned in the original proceeding. The Court has deferred consideration of that motion pending exceptions to the two Special Master's Reports. *Nebraska v. Wyoming*, 112 S.Ct. 1930 (1992).

river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;

(c) Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

(d) Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Petition for an Order Enforcing Decree and for Injunctive Relief at 2, ¶3 (Docket No. 1). The petition is reproduced in the Appendix to this brief at A-19 to A-21.[3]

In her answer, Wyoming admitted taking the actions alleged in Nebraska's petition, but denied that those actions violate the decreed apportionment, thereby presenting pure questions of law. Wyoming also filed a counterclaim alleging that Nebraska has circumvented and violated the Decree. The Wyoming Answer and Counterclaim (Docket No. 5) is reproduced at Appendix A-22 to A-30.

3. The appendices to this brief will be cited simply as "Appendix at . . ." Documents in the record certified by the Special Master have been numbered in chronological order on a Docket which accompanies and serves as an index to the record. Documents in the record are therefore cited by title as well as by the docket number.

Nebraska's claims are now before the Court on cross-motions for partial summary judgment. While resolution of some of the issues raised in the summary judgment motions would narrow the issues for trial on Wyoming's counterclaim, the counterclaim is not before the Court on the summary judgment motions. The Court has before it the entire record that was before the Special Master.[4]

II. *COURSE OF PROCEEDINGS*

A. *The Original Proceeding and the 1945 Decree*

In the original proceeding that resulted in the 1945 Decree of equitable apportionment, Nebraska requested the Court to impose an interstate priority system. Under Nebraska's proposal, water users in Nebraska with earlier appropriations would be assured a full supply before later appropriators upstream in Wyoming or Colorado could divert any water. *Nebraska v. Wyoming*, 325 U.S. at 599-600, 619-20; Report of Special Master Michael J. Doherty at 100 (1944), *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (hereinafter cited as "Doherty Report"). Wyoming opposed an interstate priority system and asserted that, if the Court were to apportion the North Platte River, such apportionment should be by means of a "mass allocation" whereby Wyoming would have a fixed delivery obligation at the state line. *Nebraska v. Wyoming*, 325 U.S. at 620, 642. Colorado, an impleaded defendant, argued strenuously for dismissal

4. As used in this brief, "Special Master" or "Master" refer to Special Master Owen Olpin who was appointed by the Court on June 22, 1987. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987). Special Master Michael J. Doherty, who served in the proceeding that resulted in the 1945 Decree, will be referred to in this brief as "Special Master Doherty".

of Nebraska's complaint on the ground that Nebraska had failed to show injury to any of the uses she sought to protect. *Id.* at 607-11. Initially, the United States was not a party but instead was held to be a Wyoming appropriator. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). The United States subsequently intervened in the original proceeding to assert that pursuant to land withdrawals for reclamation projects the United States had acquired title to all the water of the North Platte River that was unappropriated at the time of the withdrawals. The Court rejected that argument. *Nebraska v. Wyoming*, 325 U.S. at 611-16.

Special Master Doherty thought it a close question whether Nebraska had made a sufficient showing of injury to move the Court to exercise its power to enjoin the activities of the upstream states. Doherty Report at 102-05. A divided court ultimately rejected both the priority system proposed by Nebraska and the mass allocation proposed by Wyoming and adopted Special Master Doherty's recommendation for a "decree effecting a water distribution by means of the imposition of a minimum of restriction . . . ." Doherty Report at 122; *Nebraska v. Wyoming (I)*. The Decree adopted by the Court contained: (1) a limitation on the amount of irrigated acreage and the amount of storage in Colorado and Wyoming above Guernsey Dam on the main stem and above Pathfinder Reservoir on the main stem and tributaries, (2) a limited interstate priority system under which certain Nebraska canals were declared to be senior to the storage operations of specific federal reservoirs and the direct flow diversions of the government's Casper Canal in Wyoming and (3) a 75%/25% division of the natural flow present in the Guernsey Dam to Tri-State Dam reach of the North Platte River. Decree, ¶¶ I, II, III, IV and V. The Decree,

in accordance with Special Master Doherty's recommendations, included the specific restrictions on the respective states that the Court deemed necessary to protect particular equities — the requirements of certain lands irrigated by diversions between Guernsey Dam and Tri-State Dam.[5]

Nebraska had originally sought protection for senior uses downstream on the Platte River to Grand Island, Nebraska. However, at the close of evidence before Special Master Doherty, Nebraska conceded that lands east of Bridgeport, Nebraska could make no claim on water from Wyoming. *Nebraska v. Wyoming*, 325 U.S. at 607, 654-55. Special Master Doherty and the Court went further and concluded that Nebraska lands irrigated by diversions between Tri-State Dam and Bridgeport were adequately supplied by local sources and return flows and therefore would be excluded from the apportionment. The Court said, "[E]quitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628.

The Decree included some provisions which operate year around (for example, the relative priorities of the specified federal storage reservoirs in Paragraph III). However, the bulk of the Decree's provisions operate only during the May 1 to September 30 irrigation season to protect the irrigation supply to specific canals in the Guernsey to Tri-State section of the river.

5. Tri-State Dam is located in Nebraska less than a mile downstream of the Wyoming-Nebraska state line and is the point of diversion for the Tri-State Canal serving the Farmers Irrigation District and the Northport Irrigation District. Guernsey Dam is in Wyoming about 50 miles above the state line.

The Decree also included a provision for petitioning the Court to enforce the Decree or to consider changed conditions that may warrant modification of the Decree. Decree, ¶XIII. The Court's purpose in retaining jurisdiction can be gleaned from Special Master Doherty's Report. *Arizona v. California,* 460 U.S. 605, 624 n. 17 (1983). The changed condition particularly envisioned by Special Master Doherty in recommending Paragraph XIII was the "possibility of the passing of the present drouth cycle ... which might justify a release of some or all of the restrictions ..." on Wyoming and Colorado. Doherty Report at 10-11.[6]

In 1953, the Decree was modified by stipulation among the parties to allow for construction and operation of Glendo Reservoir on the main stem of the North Platte River in Wyoming. *Nebraska v. Wyoming,* 345 U.S. 981 (1953). The stipulation raised the limit on Colorado's

6. Since entry of the Decree in 1945, Nebraska's diversions in the Guernsey Dam to Tri-State Dam section have far exceeded the water requirement found by Special Master Doherty for those canals. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296). Likewise, supplies to canals below Tri-State Dam to Bridgeport have been greater than determined to be required by Special Master Doherty. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 38 (Docket No. 316). Natural flow supplies in the river have on the average been greater than the flows that occurred in the 1931-1940 period reviewed by Special Master Doherty. Affidavit of John W. Shields, Wyoming Second Motion for Summary Judgment (Docket No. 294). Finally, Wyoming has never irrigated more than 25,000 acres nor diverted more than 90,000 acre-feet in one year under the Kendrick Project even though Special Master Doherty had determined a water requirement of 168,000 acre-feet per year for 60,000 acres. Affidavit of Bern S. Hinckley at 8, ¶¶ 11-14, Wyoming Second Motion for Summary Judgment (Docket No. 294).

irrigated acreage, added Glendo Reservoir to the list of federal reservoirs described in the Decree and provided for Wyoming and Nebraska's use of storage water in Glendo Reservoir for irrigation in specific areas of the North Platte River basin. Decree, ¶¶ I, III, IV, V and XVII.

B. *The Present Proceeding*

Nebraska sought leave to file her petition to enforce the Decree in this case in October, 1986. The Court granted leave to file over Wyoming's objection and on Nebraska's assurance that "Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). *Nebraska v. Wyoming,* 479 U.S. 1051 (1987). Wyoming was permitted to file an answer and counterclaim (Docket No. 5). *Nebraska v. Wyoming,* 481 U.S. 1011 (1987). Appendix at A-22 to A-30. Motions for intervention were filed by the Platte River Whooping Crane Critical Habitat Maintenance Trust, the National Audubon Society, the Central Nebraska Public Power and Irrigation District, the Nebraska Public Power District and Basin Electric Power Cooperative. The Court then appointed the Special Master. *Nebraska v. Wyoming,* 483 U.S. 1002 (1987).

Wyoming's first motion for summary judgment was addressed to the Court and filed with the Special Master in September, 1987. Appendix at A-31 to A-35. While that motion was pending, Nebraska filed with the Court her first motion to amend the petition to seek a new or modified apportionment for instream wildlife uses. The

Court denied Nebraska's motion to amend on March 7, 1988 *(Nebraska v. Wyoming,* 485 U.S. 931) and the Special Master denied the intervention motions on April 1, 1988 (Seventh Memorandum of the Special Master (Docket No. 60)). However, the Special Master later allowed the intervention movants a very active role as "litigating amici" in which they have briefed, argued and supplied affidavits on the pending summary judgment motions.[7]

The Special Master did not make a recommendation to the Court on Wyoming's first summary judgment motion. He instead reported to the Court that he had denied the motion but left open the possibility of a later summary adjudication following additional development of the facts. Tenth Memorandum of the Special Master (Docket No. 119); First Interim Report at 17-18. The Court accepted the First Interim Report for filing without inviting exceptions. *Nebraska v. Wyoming,* 492 U.S. 903 (1989).

Following a period of extensive discovery, all four of the parties filed motions for summary judgment variously addressing Nebraska's claims. Those motions are reproduced in the Appendix. While the summary judgment motions were pending before the Special Master, Nebraska filed a "Motion to Recommend an Apportionment of Non-Irrigation Season Flows" with the Special

7. Wyoming objects to the granting of a non-traditional litigating amicus status in this case if in practice it permits amici to participate in a trial on issues that remain after the Court's decision on the motions for summary judgment. Wyoming urges the Court to limit amicus participation to a more traditional role for the same reasons the amici were denied intervention. This is an action involving sovereign state interests in which the states appear as *parens patriae* for the individual interests within each state.

Master in which she asked the Special Master to recommend to the Court that it undertake to apportion North Platte River flows in the non-irrigation season, which Nebraska contends were left unapportioned in the original proceeding (Docket No. 301). At the time Nebraska had not yet filed her second motion to amend petition. After briefing and argument, the Special Master denied that motion. Order of June 17, 1991 (Docket No. 361). Nebraska then filed her second motion to amend petition which is presently pending before the Court. Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows (Docket No. 407). That motion to amend is opposed by all of the other parties.

The Special Master has recommended a disposition of the pending cross-motions for summary judgment. Second Interim Report at 109-10. The Court has now invited exceptions to both the First and Second Interim Reports. *Nebraska v. Wyoming,* 112 S.Ct. 1930 (1992).

C. *Disposition by the Special Master*

The proceedings before the Special Master resulting in his two interim reports and these exceptions are more easily described when arranged by the four major issues raised by Nebraska's petition: (1) extent of Nebraska's apportionment (the downstream of Tri-State Dam issues), (2) Deer Creek Reservoir, (3) the Inland Lakes and (4) the Laramie River.

1. *Extent of Nebraska's Apportionment (Downstream of Tri-State Dam Issues)*

Wyoming's first motion for summary judgment sought to simplify the case and narrow the issues for trial

by confirmation that Nebraska's apportionment under the Decree is "limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal)." [First] Motion of the State of Wyoming for Summary Judgment at 5. Appendix at A-35. The Special Master acknowledged, as did Nebraska, "that the section of the North Platte River below Tri-State Dam was not included in the 1945 apportionment" and "that the apportionment itself does not extend below Tri-State Dam." First Interim Report at 33. However, the Special Master denied Wyoming's requested summary judgment because he believed it "necessary to take evidence on Nebraska's injury claims [to uses below Tri-State Dam] in order to determine whether those claims are cognizable under the Decree." *Id.* at 37.

Following the Special Master's denial of Wyoming's first motion for summary judgment, without conceding her original position, Wyoming tried through discovery to determine the nature and extent of Nebraska's claims of injury below Tri-State Dam. It became apparent that Nebraska was claiming under her present petition that the Decree entitles her to the continuation of historical return flows and historical direct flow past Tri-State Dam even though it is undisputed that those flows were surplus to the requirements of the canals in the Guernsey to Tri-State section.[8] Nebraska presented no evidence of specific injury to specific uses below Tri-State Dam, but

8. Under the Decree the natural flow in the Guernsey to Tri-State section can be exhausted in meeting the water requirements of the canals in that reach. Administration of the Decree has been designed to minimize the flow passing Tri-State Dam. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 65-66 and record cites therein (Docket No. 294).

responded to various discovery requests by alleging generally that all Nebraska water rights in the Platte River basin would be injured by any interference with the "regimen of the river." Nebraska's Answers to Colorado's First Set of Requests for Admission, Request No. 1 (Docket No. 162); Nebraska's Answers to Wyoming's Third Set of Requests for Admissions, Interrogatories and Request for Production at 3-4, 14-15, Interrogatory No. 7, Request for Admission No. 3 (Docket No. 186); Deposition of J. Michael Jess, Vol. I at 47, 110-11, 120-21, 137-42; Vol. III at 164-66, 171-72; Vol. IV at 115-16, 128-31 (Docket No. 192).

Wyoming then sought summary judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree "to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project canals and the Nebraska State Line Canals." Wyoming Second Motion for Summary Judgment at 4-5. Appendix at A-39. Wyoming again relied on the Court's conclusion that equity did not permit Nebraska to demand water from Wyoming for use below Tri-State to argue that evidence of Nebraska's diversions below Tri-State is immaterial to whether Nebraska's apportionment is being violated. *Nebraska v. Wyoming*, 325 U.S. at 628. The Special Master again declined to recommend a summary judgment excluding uses below Tri-State Dam because there has been "no factual development concerning either the quantities of water involved or the uses or non-uses of that water." Second Interim Report at 94-95. The Special Master views Wyoming's motion in this regard as a request for an advisory opinion.

Wyoming takes exception to the Special Master's refusal to give effect to the Court's decision in *Nebraska v. Wyoming (I)* and to recommend summary judgment denying Nebraska's claims of violation of the Decree to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam.

2. *Deer Creek Reservoir*

Wyoming's first summary judgment motion sought a simple determination that the Decree presently contains no restriction on Wyoming's use of the tributaries between Pathfinder and Guernsey Reservoirs and therefore that Deer Creek Reservoir would not violate the Decree as alleged in Nebraska's petition. Wyoming [First] Summary Judgment Motion at 4-5. Appendix at A-34. Wyoming also sought a confirmation that, as a source of municipal water, Deer Creek Reservoir would be within the domestic/municipal use exemption of Decree Paragraph X. *Id.* at 5. The Special Master, while acknowledging that the Decree contains no present injunction against Wyoming's use of the tributaries, held that Nebraska's petition should be interpreted broadly to invoke the Court's retained jurisdiction pursuant to Paragraph XIII(c) to consider whether new restrictions on the tributaries were necessary to protect Nebraska's apportionment. First Interim Report at 29-30.

Following extensive discovery aimed at determining the injury Nebraska asserted as grounds to impose a new injunction against construction of Deer Creek Reservoir, Wyoming filed her second motion for summary judgment. The motion challenged the sufficiency of Nebraska's evidence to meet her burden of proving that new restrictions in the Decree were warranted and also sought to confirm

that municipal use of the proposed Deer Creek Reservoir is exempt from any restriction or scrutiny under the Decree. While agreeing with Wyoming that municipal use of Deer Creek Reservoir is exempt from the Decree, the Special Master nevertheless recommends holding a trial on (1) the question of whether Deer Creek will be so administered in the future as to bring its use within the municipal exemption of Paragraph X and (2) the question of whether any non-municipal uses of Deer Creek Reservoir would cause such injury to Nebraska's apportionment as to warrant the imposition of additional restrictions pursuant to Paragraph XIII(c) of the Decree. Second Interim Report at 88-89.

Wyoming takes exception to the Special Master's recommendation for a trial on Deer Creek Reservoir and excepts to the Special Master's refusal to recommend a summary judgment that municipal use of Deer Creek Reservoir is exempt from restriction under the Decree.

3. *Inland Lakes*

Wyoming's first motion for summary judgment sought a simple determination that it was no violation of the Decree for Wyoming to seek a declaration in state or federal court of any water storage rights for the Inland Lakes. Appendix at A-35. Wyoming had pending at that time an action in the federal district court to determine whether the Inland Lakes had a water right under state law.[9] The Special Master denied Wyoming's summary

9. *Wyoming ex rel Christopulos v. United States*, No. C86-0370-B (D. Wyo. filed October 3, 1986) (Order Staying Proceedings March 27, 1987, Order of Dismissal without prejudice August 31, 1990). The dismissal order noted that related issues were pending in the Supreme Court and that the case could be "refiled when and if there becomes a need to do so."

judgment motion and indicated his belief that the Supreme Court intended him to proceed with trial on the issue of "whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904 and certain water rights for their historical administration under the Decree, . . ." First Interim Report at 19.

Further research and discovery concerning the United States' Inland Lakes water rights claims followed the Special Master's First Interim Report. The United States and Nebraska then filed motions for summary judgment in which they sought a ruling that the Inland Lakes enjoy a 1904 priority under the Decree for storage of 46,000 acre-feet of water during the months of October, November and April. Their focus had shifted from claims that the Inland Lakes enjoy a water right under state law to claims that the Decree is the basis of the right. Wyoming's response requested a summary judgment confirming that the Inland Lakes possess no water right under state law or the Decree and recognizing that the question of whether any interference with historical deliveries to the Inland Lakes would injure Nebraska's apportionment under the Decree is a factual issue on which Nebraska has the burden of proof. Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 104-05. (Docket No. 334, excerpt reproduced in Appendix at A-49 to A-50.) The United States' motion also claimed a right to store water for the Inland Lakes in Guernsey and Glendo Reservoirs under a 1904 priority, a claim not made by Nebraska. Appendix at A-40.

The Special Master has recommended granting the motions for summary judgment of Nebraska and the United States and has also recommended that the Decree

be modified to expressly enjoin Wyoming from interfering with storage of "no less than" 46,000 acre-feet per year in the Inland Lakes. Without explanation, the Special Master also recommends summary judgment finding that the United States' existing water storage rights for Guernsey Reservoir (1923 priority) and Glendo Reservoir (1951 priority) include a right to store water for the Inland Lakes under a 1904 priority.

Wyoming takes exceptions to these recommendations and urges the Court instead to enter partial summary judgment that the Inland Lakes have no priority for storage under state law or the Decree.

4. *Laramie River*

Nebraska's petition paragraphs 3(a) and 3(b) allege that the existing Grayrocks Reservoir and the proposed Corn Creek Project on the Laramie River violate Nebraska's apportionment under the Decree. Appendix at A-19 to A-20. Wyoming's first summary judgment motion sought, among other rulings, a simple ruling as a matter of law that "[t]he Decree does not restrict Wyoming's use of water from the Laramie River." Motion of the State of Wyoming for Summary Judgment at 4. Appendix at A-33. Wyoming's argument was grounded on the recognition in *Nebraska v. Wyoming,* 325 U.S. at 592 n.1, that the Laramie River had been previously apportioned in *Wyoming v. Colorado,* 259 U.S. 419, *amended,* 260 U.S. 1 (1922), and on Special Master Doherty's exclusion of the Laramie River from the recommended apportionment. Doherty Report at 177. The Special Master "acknowledged that these references could, if accepted uncritically at face value, be interpreted to apportion all Laramie River flows between Colorado and

Wyoming, leaving no room for any claims to Laramie flows beyond its confluence with the North Platte." First Interim Report at 23. However, he "found sufficient material factual issues to foreclose such an uncritical interpretation at this juncture and to require the taking of evidence on the Laramie." *Id.*

The parties then undertook an extensive review of the record in the original proceeding to determine if the Court meant something other than the plain exclusion of the Laramie River from the apportionment. That research revealed that Nebraska had litigated her claim to an apportionment of the Laramie River in the original proceeding. Nebraska and Wyoming agreed that there were no genuine issues of material fact but urged opposite conclusions about whether the Decree apportioned any Laramie River water to Nebraska. Wyoming Second Motion for Summary Judgment at 2, ¶3, Appendix at A-36 to A-37; Nebraska's Motion for Partial Summary Judgment at 2, 4-5, ¶¶ 2, 4, Appendix at A-42 to A-45. The Special Master agreed that "the underlying facts are not in dispute" and he rejected Nebraska's legal theory that she was apportioned a specific share of the Laramie. However, he refused to recommend summary judgment for Wyoming that the Decree excluded water in the Laramie River. Second Interim Report at 40-41.

Wyoming takes exception to the Special Master's failure to conclude that the Laramie River was excluded from Nebraska's apportionment and his consequent failure to recommend summary denial of Nebraska's claims that Grayrocks Reservoir or the proposed Corn Creek Project violate Nebraska's apportionment under the Decree.

SUMMARY OF ARGUMENT

The Decree to be interpreted and enforced in this case is not ambiguous. It contains specific injunctions that define in clear and unambiguous terms what each of the states is called upon to do or refrain from doing. The Court imposed only such injunctions in the Decree as it deemed necessary to protect North Platte flows for specific irrigation uses on Wyoming and Nebraska lands served by diversions between Guernsey and Tri-State Dams.

Three fundamental principles are key to resolution of the summary judgment motions now before the Court:

1. Nebraska's petition seeks only to enforce Nebraska's apportionment under the Decree, not to expand or enlarge that apportionment;

2. The Decree is not the source of, but only a limitation on, Wyoming's authority to use and permit the use of water of the North Platte River or its tributaries;

3. Plain and unambiguous language in the Court's opinions and decrees should be given effect and matters that were determined in prior actions may not be relitigated in this action to enforce the Decree.

The Special Master's failure to recognize and apply these principles affected his entire analysis and led him to recommend the wrong result.

The most important matter presented for resolution in the summary judgment motions is the dispute over

the extent of Nebraska's apportionment under the Decree. The core of Nebraska's petition is the claim that certain Wyoming actions violate Nebraska's apportionment under the Decree. Unless the extent of that apportionment is defined, there is no way to measure Nebraska's evidence to determine if she is entitled to proceed to trial or ultimately to determine if she is entitled to the relief sought in the petition. In the original proceeding, the water requirements of the specific irrigation canals diverting in the Guernsey Dam to Tri-State Dam section of the river were litigated and determined as the measure and the limit of Nebraska's right to demand water from Wyoming. That previous determination may not be relitigated in this action to enforce the Decree. As a matter of law, no matter what evidence Nebraska might offer with respect to uses below Tri-State Dam, she may not premise a violation of the Decree on injury to such uses. A ruling to that effect would narrow the issues for trial.

A ruling defining the extent of Nebraska's apportionment under the Decree is also critical to a determination of Nebraska's claim under Paragraph XIII(c) of the Decree that new restrictions on Wyoming's use of the tributaries such as Deer Creek are necessary to protect Nebraska's apportionment. Nebraska would be entitled to a trial on her claim that Deer Creek Reservoir will violate the apportionment only if Nebraska could show by clear and convincing evidence a serious and imminent threat to her decreed apportionment, i.e., to the supply for the beneficial use requirements of the canals in the Guernsey Dam to Tri-State Dam section of the river. Because Nebraska's affidavits and other evidence fall short of meeting this burden, summary judgment should be entered for Wyoming dismissing Nebraska's claim

that Deer Creek Reservoir would violate the decreed apportionment.

Even if Nebraska's evidence were deemed sufficient to warrant a trial with respect to the impact of Deer Creek Reservoir on Nebraska's apportionment, under Paragraph X of the Decree, Wyoming is entitled to build and operate Deer Creek Reservoir for municipal purposes. The Special Master correctly confirmed that ordinary and usual municipal uses of Deer Creek Reservoir are exempt from any restriction or scrutiny under the Decree. However, he incorrectly determined a need to hold a trial on the wisdom of Wyoming's decision to build Deer Creek Reservoir and whether state officials in the future would administer Deer Creek Reservoir according to state law. Affidavits supplied by both Nebraska and Wyoming establish that the municipal uses to be supplied by Deer Creek Reservoir are similar in amount and character to uses commonly served by municipalities throughout the North Platte basin. No trial is needed to determine that the municipal uses to be supplied by Deer Creek Reservoir are ordinary and usual within the plain meaning of Decree Paragraph X because there is no evidence to the contrary. The other issues of fact identified by the Special Master, such as the economic feasibility of Deer Creek Reservoir, the efficiency of Deer Creek Reservoir and policy decisions about alternatives to Deer Creek Reservoir are immaterial to whether Deer Creek Reservoir is within the Paragraph X exemption. Furthermore such issues are inappropriate for judicial resolution in the original jurisdiction of the Supreme Court.

The United States never obtained a water storage right under state law for the Inland Lakes in Nebraska. Nor was a specific water storage right determined for the

Inland Lakes in the original proceeding. The Decree is silent as to the Inland Lakes because the Court was never asked to determine a water right for those lakes. Rather than simply ruling as a matter of law that the Inland Lakes were awarded no water storage priority in the Decree, the Special Master without a trial found on the basis of "equitable concerns" alone that the Inland Lakes should "have a priority right of December 6, 1904, to store at least 46,000 acre-feet of water during the months of October, November, and April." Second Interim Report at 109. The Special Master based this finding on affidavits and other evidence that were specifically disputed. He misapplied the summary judgment standards announced by the Court in recent cases by disbelieving or ignoring sworn affidavits and other documents disputing the facts he found with respect to the Inland Lakes. Further, the Special Master's conclusion at this stage of the proceeding that Wyoming's action with respect to the Inland Lakes would adversely affect Nebraska's apportionment is without foundation because he refused to define the extent of Nebraska's apportionment.

The Special Master's conclusion that the United States has a right to store Inland Lakes water in Guernsey or Glendo Reservoir under a 1904 priority is created from whole cloth. It ignores overwhelming evidence, including the admission of the United States' own expert witness, that such use of Glendo and Guernsey Reservoirs in the past was only by mutual consent of the states and the United States on a year-to-year basis. Moreover, it ignores the state law water rights, the congressional authorizations and the government's contractual obligations for the uses of Guernsey and Glendo Reservoirs.

The Special Master refused to give effect to the plain language of the Court's opinion and decree excluding the Laramie River from the apportionment of the North Platte in the original proceeding. Nebraska's claim for an apportionment of the Laramie River was litigated in the original proceeding. Special Master Doherty and the Court found no restriction on Wyoming's use of the Laramie River to be necessary to the equitable apportionment. Therefore the Court excluded the Laramie River from the apportionment. *Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Twelve years later in *Wyoming v. Colorado*, 353 U.S. 953 (1957), the Court adopted an amended decree apportioning the Laramie River between Colorado and Wyoming that increased Colorado's share of the Laramie River and confirmed Wyoming's "right to divert and use all water flowing and remaining in the Laramie River" after the use apportioned to Colorado under that decree. The Court cannot adopt the Special Master's recommendations on the Laramie River without overruling its previous decrees and opinions in this case and in *Wyoming v. Colorado*.

This is an action to enforce the existing apportionment under the Decree, not to determine whether an apportionment or reapportionment of the Laramie River is warranted as a matter of equity. Consequently, the Court should reject the Special Master's recommendation for further proceedings concerning Grayrocks Reservoir or the proposed Corn Creek Project. Wyoming is entitled as a matter of law to summary judgment dismissing Nebraska's claims that those uses of the Laramie River would violate the Decree.

ARGUMENT

I. *THE COURT SHOULD DETERMINE FROM AN INDEPENDENT REVIEW OF THE RECORD WHETHER THERE ARE DISPUTED ISSUES OF FACT THAT REQUIRE A TRIAL*

The Court is not functioning in its usual appellate role in this original action. Although the Court has appointed a Special Master to recommend a ruling, the Court is ultimately responsible for deciding the case. *See generally United States v. Maine,* 475 U.S. 89, 97 (1986); *Colorado v. New Mexico,* 467 U.S. 310, 317 (1984).

The Special Master held no trial and took no evidence. The documentary record that was before the Special Master is now before the Court. Even if this were an appellate case in the same posture, the Court would review the record independently and decide the issues of law. *See Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3186 (1990) ("[B]ecause this case comes to us on petitioners' motion for summary judgment, we must assess the record under the standards set forth in Rule 56 of the Federal Rules of Civil Procedure").

Supreme Court Rule 17.2 provides that the Federal Rules of Civil Procedure may be taken as a guide in original actions where their application is appropriate. The Court in a series of cases in recent years has instructed the lower federal courts on the use of Fed.R.Civ.P. 56 to resolve cases which do not require a factual trial. *See Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177 (1990). Contrary to the Special Master's belief that application of

those decisions should be tempered in an original action (Second Interim Report at 10), the fact that this is a suit between states does not mean that use of the Federal Rules of Civil Procedure would be inappropriate. States have the same interest in efficiently resolving litigation and the same right to avoid an unnecessary trial as any other litigant. While the Court has recognized the importance of allowing a full development of the facts in original actions (*e.g., United States v. Texas,* 339 U.S. 707, 715 (1950)), there has been ample opportunity here through discovery and pretrial proceedings for the parties to develop the material facts required to support their claims.

The Special Master has inferred that, when the Court granted Nebraska leave to file her petition over Wyoming's objection and appointed a special master, it "reviewed the factual adequacy of Nebraska's case" and "preliminarily determined that there are factual issues in dispute." Second Interim Report at 10. See also First Interim Report at 5, 18, where the Special Master thought that in granting leave to file the petition "the Court had already reviewed and considered the arguments later made by Wyoming in her summary judgment motion." Such inferences read too much into the granting of leave to file the case. The issue then was not the "factual adequacy of Nebraska's case", but rather the sufficiency of Nebraska's initial pleadings to invoke the Court's jurisdiction to consider alleged violations of the Decree. Moreover, the Court's appointment of a special master did not mean that the Court had identified factual issues that would preclude summary judgment. *See Maryland v. Louisiana,* 451 U.S. 725 (1981) (where even though the special master recommended that a trial be held, the Court resolved the case on a motion for judgment on the pleadings); *Wyoming v. Oklahoma,* 112 S.Ct. 789 (1992).

The posture of the case now is quite different than when the Court granted leave to file and appointed the Special Master. At this summary judgment stage, Nebraska may not rely on mere allegations in her pleadings but must come forward with "specific facts showing that there is a genuine issue for trial" on the violation of the Decree alleged in her petition. *Lujan v. National Wildlife Federation*, 110 S.Ct. at 3186; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; Fed.R.Civ.P. 56(e).

II. *THE SPECIAL MASTER'S ANALYSIS RESTS ON A FUNDAMENTAL MISCONCEPTION OF THE DECREE AND THE NATURE OF THIS LAWSUIT*

A. This is an Action to Interpret and Enforce the Decree

The Special Master reached the wrong result in his two reports because he failed to recognize this lawsuit as one to enforce and protect the existing apportionment, not to enlarge, expand or modify the apportionment. In her answer and in her first summary judgment motion, Wyoming admitted taking the actions alleged in Nebraska's petition but denied as a matter of law that those actions violate the Decree. Nebraska then sought to amend her petition to seek a modification of the Decree. Since Nebraska's motion to amend her petition was denied, Nebraska has tried to characterize her original petition as requesting enlargement of her apportionment.

When asked to admit that her petition does not request the Court to expand or modify the Decree to protect "flows in excess of the requirements for uses above Tri-State Dam", Nebraska responded,

> Denied. "The Petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River..." ... Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding.

Nebraska's Answers to Colorado's First Set of Requests for Admission at 5, Request No. 10 (Docket No. 162). Nebraska's response flatly contradicts the representation she made to the Court when seeking leave to file the petition: "Nebraska does not seek to modify the Decree in any respect...." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4).

The power of the Court to reconsider the Decree and to modify the equitable apportionment in an action properly brought and accepted for that purpose is not questioned. But the Court has not accepted such an action. In view of Wyoming's admissions regarding the actions alleged in Nebraska's petition, the case referred to the Special Master presents legal issues of interpretation of the Decree and particularly the extent of Nebraska's apportionment under the Decree. Instead of focusing on those disputes, which are questions of law, the Special Master has accepted Nebraska's changed characterization of her petition as one to modify or enlarge her apportionment and has recommended a trial to equitably apportion water among competing equities in the first instance.

When the dispute over interpretation of the Decree has been decided, any party not satisfied with the answer

may ask the Court to reopen the Decree or to modify the apportionment. However, before entertaining such a suit the Court would require a sufficient showing at the threshold not only to demonstrate a serious threat of imminent harm but also to overcome the principles of finality and certainty that militate against upsetting the existing decreed apportionment. *Arizona v. California,* 460 U.S. 605 (1983); *Nevada v. United States,* 463 U.S. 110 (1983). The Special Master's recommendation would allow Nebraska to avoid that threshold showing and would deprive the Court of the ability to decide in the first instance whether to exercise jurisdiction over such an action to modify the Decree.

B. *The Decree is Not the Source of Wyoming's Authority to Use Water Within Her Borders, But Only a Limit on the Exercise of That Authority*

The second fundamental error that tainted much of the Special Master's analysis was his misconception of the Decree as a *grant* of authority to Wyoming to divert and use the water of the North Platte River and its tributaries. For example, because the Special Master does not find in the Decree a specific grant of authority to Wyoming to use Laramie River water, he infers that such use was intended to be precluded or at least subject to challenge by Nebraska in an action to enforce the apportionment. *See, e.g.,* Second Interim Report at 39 ("I therefore have determined that the Decree does not grant the right to Wyoming . . . to dewater the Laramie . . . ."). Contrary to the Special Master's view, the Decree is not the source of Wyoming's authority to use water or to permit the use of water within her borders. Rather, that authority is inherent in Wyoming's sovereignty and the Decree provides only the specific limitations on the

exercise of that authority that the Court deemed necessary to protect specific uses in Nebraska.

The Court does not interfere with the sovereign authority of a state at the instance of a sister state unless the alleged injury is shown by clear and convincing evidence to be both imminent and of serious magnitude. *Missouri v. Illinois,* 200 U.S. 496, 520-22 (1906); *New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Idaho v. Oregon,* 462 U.S. 1017 (1983). The Decree was intended to protect specific uses or equities that Nebraska was able to prove in need of such protection. In accord with the principle that the Court would interfere as little as possible, and only where absolutely necessary, with the sovereignty of the states, Special Master Doherty recommended and the Court adopted a decree containing the "minimum of restriction" found necessary to protect those specific equities. Doherty Report at 122. See also Decree, ¶XII(a); *Nebraska v. Wyoming,* 325 U.S. at 608 (citing *Missouri v. Illinois,* 200 U.S. 496, 521 (1906); *Colorado v. Kansas,* 320 U.S. 383, 393-94 (1943)). Therefore, Wyoming law controls the use of water from the North Platte in Wyoming except where the Decree imposes specific injunctions.

C. *The Special Master Failed to Afford Finality to Matters That Were Fully Litigated and Determined in the Original Proceeding*

Matters that were litigated and determined in the original proceeding are not subject to relitigation in this action to enforce the apportionment. *Wyoming v. Colorado,* 286 U.S. 494, 507 (1932). Even if this were an action under the Court's retained jurisdiction to reopen or modify the Decree, strong principles of finality and

certainty militate against relitigating matters that were previously determined. *Arizona v. California*, 460 U.S. 605, 619-20 (1983). The Special Master's failure to recognize and apply the principle of finality, as well as his failure to give effect to the plain language of the Court's opinions and decrees, led him to unduly complicate this case.

For example, in the original proceeding Nebraska sought a ruling that, as a matter of equitable apportionment, Nebraska water users on the Platte River downstream to Grand Island, Nebraska should have a right to call for water from Wyoming. *Nebraska v. Wyoming*, 325 U.S. at 607. After 11 years of litigation, the Court determined that only those rights diverting at or upstream of Tri-State Dam could in equity demand natural flow water from Wyoming. *See* Second Interim Report at 18, 90-91. The fact that these matters were litigated and determined could not have been explained more clearly by the Court:

> It is said that Nebraska can permit, as it has heretofore, water to pass the Tri-State Dam for uses below that point even though her equitable share is calculated only on the basis of the needs of appropriators at or above Tri-State. And it is pointed out that the lands served by diversions below Tri-State have no equitable claim on water originating in Wyoming or Colorado, their needs being reasonably met by local supplies. We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. at 628. *See also id.* at 654-55.

In short, the requirements of Nebraska's canals in the Guernsey to Tri-State section were litigated and determined as the measure of Nebraska's apportionment. Because he did not recognize the finality of that determination, the Special Master thought his task was to determine in the first instance what protections *should be afforded* as a matter of equity to uses below Tri-State Dam rather than to determine what protections *were afforded* as a matter of right in the 1945 Decree.

Similarly, the Special Master failed to acknowledge that Nebraska's claim to restrict Wyoming's use of the Laramie River was litigated and denied in the original proceeding. Consequently, instead of giving effect to the plain language of the Court's Decree and opinion excluding the Laramie from the apportionment, he recommends further proceedings in which Nebraska could relitigate her claims to restrict Wyoming's use of the Laramie River.

III. *NEBRASKA'S APPORTIONMENT OF NATURAL FLOW IN THE WHALEN TO TRI-STATE DAM SECTION OF THE RIVER WAS INTENDED TO PROVIDE A SUPPLY FOR THE DETERMINED WATER REQUIREMENTS OF THE NEBRASKA LANDS SUPPLIED BY CANALS DIVERTING AT AND ABOVE TRI-STATE DAM*

Nebraska's petition asserts that proposed uses of water in Wyoming will violate "Nebraska's apportionment established in the Decree." Petition for an Order Enforcing Decree and for Injunctive Relief at 2, Appendix at A-19. Unless the extent of Nebraska's apportionment established in the Decree is defined, there is no standard against which to measure Nebraska's evidence

to determine whether Nebraska should have the relief she seeks, or even whether she has come forward with sufficient evidence to avoid summary judgment and to proceed to trial.

For example, while Nebraska must acknowledge that nothing in the Decree expressly restricts Wyoming's development on tributaries such as Deer Creek, or expressly determines a 1904 priority for storage in the Inland Lakes, she nonetheless asserts that an injunction against construction of Deer Creek Reservoir and determination of a 1904 priority for the Inland Lakes are necessary to prevent a violation of her apportionment under the Decree. Nebraska must show more than just some effect on the historical flows or on "equities" below Tri-State Dam in order to establish a violation of her apportionment under the Decree. She must establish a serious and imminent threat to Nebraska uses that formed the basis of that apportionment — uses diverting at and above Tri-State.

Wyoming requests only that the Court treat Nebraska's claims of injury in this proceeding in the same manner as Special Master Doherty did when originally defining Nebraska's right to demand water from Wyoming. In analyzing Nebraska's injury claims, Special Master Doherty excluded uses below Tri-State Dam and instructed Nebraska to rework her analysis of injury to the Guernsey to Tri-State canals by limiting the demands of those canals to the level of requirements he ultimately adopted. Doherty Report at 103. *See also id.* at 67-82 (where Special Master Doherty also discounted evidence of historical diversions beyond the determined requirements in his overall analysis of the sufficiency of North Platte River supplies).

The Court decided unequivocally in the original proceeding that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. *See also id.* at 654-55. That determination may not be relitigated here but should be given effect and should control the course of the proceedings in this case.

A. *Wyoming is Entitled to Summary Judgment Denying the Nebraska Claims That are Based on Either an Alleged Reduction of Direct Flow Passing Tri-State Dam or an Alleged Reduction of Return Flow from Diversions in Excess of the Water Requirements of the Nebraska Canals Determined in the Original Proceedings*

Wyoming's first summary judgment motion sought a partial summary judgment defining the limits of Nebraska's apportionment under the Decree as a matter of law to control the remaining course of proceedings. Appendix at A-33, A-35. The Special Master denied that motion stating that "it is difficult to rule on the question on which Wyoming seeks a summary judgment until Nebraska's injury claims are fully articulated." First Interim Report at 35. Nebraska took advantage of that cart-before-the-horse approach and devised a claim that she is entitled under the Decree to the maintenance of the historical "regimen of the river." That claim extends both to surplus natural flow that historically passed Tri-State Dam and to historical return flows below Tri-State Dam resulting from diversions in excess of the water requirements determined by the Court in the original proceeding. Nebraska's Answers to Wyoming's Third Set of Requests for Admissions, Interrogatories and Request

for Production at 3-4, 14-15, Request for Admission No. 3, Interrogatory Nos. 7, 8 and 9 (Docket No. 186); Nebraska's Answers to Colorado's First Set of Requests for Admission at 1, Request No. 1 (Docket No. 162); Deposition of J. Michael Jess Vol. I at 47, 110-11, 114-15, 131, 137-42; Vol. III at 164-66, 171-72; Vol. IV at 115-16, 128-31 (Docket No. 192). Wyoming's second motion for summary judgment requests summary denial of those claims for the simple reason that Nebraska's apportionment does not extend to uses below Tri-State Dam. Appendix at A-39.

The Special Master's Second Interim Report does not address the issue posed by Wyoming's second motion for summary judgment: whether under any set of facts that might be shown by Nebraska respecting uses below Tri-State Dam, Nebraska may establish a violation of her decreed apportionment on injury to such uses. The Special Master finds that to answer that question would be to give an advisory opinion. He recommends that the Court direct him first to take evidence on Nebraska's uses below Tri-State Dam and only thereafter to determine if such evidence could establish a violation of the Decree.

There is nothing abstract about the question Wyoming poses. Rather, to define the extent of Nebraska's apportionment at this stage would dispose of those specific claims. *See United States v. California*, 332 U.S. 19, 26 (1947) (where a pre-trial determination of the basic legal issue of ownership of the three-mile marginal ocean belt served to narrow the remaining issues for trial); Advisory Committee Notes Accompanying the 1946 Amendment to Fed.R.Civ.P. 56. There would be no need for the parties to spend the enormous amount of time and money that a trial on the uses below Tri-State Dam would

consume if the Court would confirm (1) that the requirements of Nebraska's canals in the Whalen to Tri-State Dam section are the measure and limit of Nebraska's existing apportionment and (2) that this case is only an action to enforce that apportionment.[10] In short, even if Nebraska had made out a clear case of injury to uses below Tri-State Dam, or to the equities which she says have come to rely on surplus direct flow or excess return flows below Tri-State Dam, she would not be entitled to relief in this action to enforce the existing apportionment.[11]

B. *The Special Master Failed to Give Effect to the Diversion Limitations and Seasonal Limitations on Nebraska Canals Fixed in Paragraph IV of the Decree*

The Special Master recommends that summary judgment be granted on one aspect of Nebraska's motion: "that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis." Second Interim Report at 109. Wyoming recognizes that the Decree contains no injunction prohibiting Nebraska from allocating her share of the available natural flow as she sees fit or from allowing diversions by canals in the Whalen to Tri-State Dam section in excess of the determined water requirements when there is surplus water available for such diversion. However, there

10. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 77-80 (Docket No. 294) for a discussion of the expanded scope of trial that would be required to litigate all the issues below Tri-State Dam.
11. Wyoming has described the speculative nature of Nebraska's claims of threatened injury to uses below Tri-State in the Wyoming Brief in Opposition to Nebraska's Motion for Leave to File Amended Petition (Docket No. 419).

are consequences under the Decree if Nebraska allows such excess diversions.

Paragraph IV of the Decree affords certain Nebraska canals a limited, interstate priority call against the storage of natural flow in the upstream federal reservoirs in Wyoming. The extent of the right of each of those canals to curtail storage in the federal reservoirs is expressly fixed in Paragraph IV in terms of both an instantaneous flow rate and a seasonal volume of water. A determination of the limits of the senior, calling priority is fundamental to the practical implementation of a system of prior appropriation. The Court recognized that in 1945 when it noted that "[u]nless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible." *Nebraska v. Wyoming*, 325 U.S. at 627. The Court's definition of storage water also recognized that the limit of Nebraska's right to call natural flow through the federal reservoirs was "the requirements of any canal as recognized in the decree." *Id.* at 631. Any summary judgment in this regard therefore must clarify that the federal reservoirs are not required to bypass natural flow to a senior Nebraska canal under Paragraph IV when that canal is exceeding the diversion limits or seasonal limits fixed in Paragraph IV.

While the Decree does not limit or prescribe the allocation of natural flow among the Nebraska canals *inter se*, without question it determined each canal's right to demand water from Wyoming. And the Decree may thereby have an "indirect effect" on individual rights within the state. *Id.* at 627 (citing *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

A basic principle at the heart of all three states' water laws and the Reclamation Act of 1902 is that beneficial use is "the basis, the measure and the limit of the right to use water." Wyo. Stat. §41-3-101 (1977); Neb. Rev. Stat. §46-231 (1988 Reissue); Colo. Const. Art. XVI, §6; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 P. 966 (1892); Reclamation Act of 1902, 43 U.S.C. §372 (1990). *See also Arizona v. California*, 376 U.S. 340 (1964) (defining a "perfected water right" as a right that has been acquired in accordance with state law and exercised by use of a specific quantity of water on a defined area of land).

The purpose of the Decree's restrictions on Wyoming and Colorado was not to allow Nebraska to divert an unlimited amount of water through her canals. Rather, the restrictions in the Decree were to protect the use on specified lands in Nebraska. While Nebraska may be free to divert excess flows in any one canal as against other Nebraska canals, she has no right to such excess diversions enforceable under the Decree against upstream states.[12]

12. Affidavits submitted by both Nebraska and Wyoming establish the undisputed fact that the Nebraska canals in the Whalen to Tri-State section have frequently diverted far in excess of the requirements determined in the original proceedings. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, and related figures and tables, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296).

IV. *NEBRASKA HAS NOT PRESENTED SUFFICIENT EVIDENCE TO WARRANT A TRIAL ON THE ISSUE OF WHETHER DEER CREEK RESERVOIR WILL VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE*

The Special Master recognized that the Decree does not presently restrict development on the tributaries between Pathfinder and Guernsey Dam. First Interim Report at 29 n.60. But he rejected Wyoming's argument that Nebraska's petition requires no further analysis to determine whether the Deer Creek Reservoir will violate Nebraska's apportionment. Instead, the Special Master treated Nebraska's petition as a request under Paragraph XIII(c) of the Decree to consider the need for new restrictions on Wyoming's use of the tributaries between Pathfinder and Guernsey to prevent injury to Nebraska's apportionment. First Interim Report at 29-31; Second Interim Report at 71-72.

The Special Master then rejected Wyoming's assertion that, in order to proceed to trial under Paragraph XIII(c), Nebraska must establish by clear and convincing evidence a serious and imminent threat to her apportionment determined in the original proceeding. The Special Master concluded:

> The Court requires states to bear a heavier burden than the usual civil litigant only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas,* 320 U.S. 383, 399 (1943). Here, the interference has already occurred by entry of the Decree.

Second Interim Report at 13.[13] That conclusion is incorrect for the simple reasons that the Decree contains no injunction against Wyoming's use of the tributaries and that the Special Master treats Nebraska's petition as a request for a new injunction under Paragraph XIII(c).

The Court in 1945 rejected the United States' request for restrictions on the tributaries between Pathfinder Reservoir and Guernsey Reservoir based on Special Master Doherty's finding that "the runoff of the tributaries becomes so far exhausted before any shortage of water occurs in the main river that any regulation of the tributary diversions would be of no material benefit." *Nebraska v. Wyoming,* 325 U.S. at 624. The Court also noted that the Nebraska and United States evidence demonstrated no "present threat to the water supply from this source." *Id.* at 624-25. Equitable relief is granted against a state in the original jurisdiction only if imminent harm of serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts,* 282 U.S. 660 (1931); *Idaho v. Oregon,* 462 U.S. 1017 (1983). Having failed to prove the need for any restriction on the tributaries in the earlier litigation, Nebraska certainly should face the same burden of proof when she now seeks such restriction under Paragraph XIII(c) of the Decree. In light of the Court's reluctance to relitigate matters that were once determined, Nebraska should face an even greater burden to revisit the Court's finding in the original proceeding that the tributary supply is so far exhausted by local water rights as to be of little use to

13. Wyoming notes that in an ordinary civil contempt proceeding an allegation of violation of a court decree must be proved by clear and convincing evidence. *Washington-Baltimore Newspaper v. Washington Post,* 626 F.2d 1029, 1031 (D.C. Cir. 1980); *Schauffler v. Local 1291,* 292 F.2d 182, 190 (3d Cir. 1961).

the canals in the Guernsey to Tri-State section in times of shortage. *Arizona v. California,* 460 U.S. 605, 624-25 (1983).

The question of whether Deer Creek Reservoir would violate Nebraska's apportionment under the Decree turns on a clear definition of that apportionment. Since "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State", Nebraska may proceed to trial on Deer Creek Reservoir only if her evidence is sufficient to show by clear and convincing evidence a serious and imminent threat to Nebraska's apportionment for uses diverting at or above Tri-State Dam. *Nebraska v. Wyoming,* 325 U.S. at 628. *See* Argument, part III above.

In support of her second motion for summary judgment, Wyoming pointed out that none of the affidavits by Nebraska's and the United States' experts had demonstrated any material injury by Deer Creek Reservoir to Nebraska's apportionment under the Decree — to the supply to Nebraska lands irrigated by diversions between Whalen and Tri-State Dam.[14] Wyoming Brief in Support of Second Motion for Summary Judgment at 93-101 (Docket No. 294). The affidavits submitted by Nebraska in support of her motion for partial summary judgment demonstrated further that Nebraska had no evidence to show that Deer Creek Reservoir would adversely affect her apportionment for uses diverting between Guernsey and Tri-State. In fact, the March 1, 1991 affidavit of

14. In fact, it is undisputed that Deer Creek Reservoir will store water only in times of surplus flows. Deposition of David G. Wilde, Vol. II at 397-400 (Docket No. 158); Affidavit of David G. Wilde at 38, United States Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83).

Nebraska's expert H. Lee Becker concluded that, based on a computer simulation study developed by Mr. Becker, "[h]istoric diversions from Whalen [Guernsey Dam] to Tri-State can be met" even if Deer Creek Reservoir is built, the Inland Lakes are administered without a priority and the flows of the Laramie are fully depleted in Wyoming. March 1, 1991 Affidavit of H. Lee Becker, ¶¶ 9-10, Nebraska's Motion for Partial Summary Judgment at 45-46 (Docket No. 296).

In her subsequent response to Wyoming's second summary judgment motion, Nebraska submitted a further affidavit by Mr. Becker. There he concluded that Deer Creek Reservoir, if operated under the assumptions contained in a computer simulation model used by the Army Corps of Engineers in preparing the Deer Creek Environmental Impact Statement, would reduce carryover storage in the federal reservoirs and "*could* limit diversions in the Whalen to Tri-State reach in a series of dry years." April 25, 1991 Affidavit of H. Lee Becker, ¶2, Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment at 9 (Docket No. 335) (emphasis added).[15] The Special Master discounted Mr.

15. Although the United States has not filed any claims against Wyoming in this action to protect its projects, the Special Master based his decision to deny Wyoming's first summary judgment motion in part on statements by the government's witness David G. Wilde that Deer Creek Reservoir may affect the federal reclamation projects. First Interim Report at 30-31. The United States Army Corps of Engineers reached the opposite conclusion when considering whether issuance of a permit to construct Deer Creek Reservoir was in the public interest. The Corps concluded that Deer Creek Reservoir will not significantly affect the federal projects. May 5, 1988 Record of Decision Deer Creek Dam and Reservoir at 16-22 (Docket No. 84a); April, 1988 Supplemental Information Document to the Final Environmental Impact Statement for Regulatory Permits Deer Creek Dam and Reservoir Wyoming at 16 (Docket No. 84a).

Becker's earlier affidavit and relied on the later statement alone in finding a sufficient factual dispute to avoid summary judgment. Second Interim Report at 75-76. He recommends denial of Wyoming's summary judgment because "Wyoming has not satisfactorily countered Mr. Becker's analysis." *Id.* at 77.

The issue is not whether Wyoming has countered Mr. Becker's statements, but rather whether Mr. Becker's statements themselves would be sufficient to meet Nebraska's burden of proof. The analysis prescribed in the Court's recent summary judgment cases calls for summary dismissal of Nebraska's claims. First, it is proper and necessary to consider the heightened standard of proof applicable to actions between states in evaluating whether Nebraska could prove her case on Deer Creek Reservoir. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. If it appears that Nebraska's proof on even one of the essential elements of her claim is insufficient to meet that standard, summary judgment is warranted. *Celotex Corporation v. Catrett*, 477 U.S. 317. Finally, plaintiff's affidavits in response to a summary judgment challenge must contain more than a "general allegation of injury" to make out a case for trial. *Lujan v. National Wildlife Federation*, 110 S.Ct. at 3186, 3188-89.

The statement of Mr. Becker that the Special Master relied on is even less than a "general allegation of injury"; it is a mere speculation of some possible impact on the diversions in the Guernsey to Tri-State section. The Becker affidavit does not quantify the alleged impact. Nor does it tie the alleged impact to the water requirements that were determined as the basis of Nebraska's apportionment. Rather, it only suggests the possibility that Deer Creek Reservoir could affect historical diversion amounts which have greatly exceeded those determined requirements. *See Wyoming v. Oklahoma*, 112 S.Ct. 789, 807 n.1 (1992) (J. Scalia, dissenting) ("just as the requirements for summary judgment are not met when a court makes unsubstantiated inferences about a third party's behavior, *see, e.g., Lujan v. National Wildlife Federation* . . ., they are not met when the plaintiff hires an outside expert to do the same").

In summary, Nebraska has not presented evidence which, if proved, would establish a violation of the existing Decree or would move the Court to impose new restrictions on Wyoming's use of the tributaries between Pathfinder and Whalen in an action for that purpose under Paragraph XIII(c). Therefore, no trial is warranted with respect to Deer Creek Reservoir.

V. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT CONFIRMING THAT MUNICIPAL USES OF DEER CREEK RESERVOIR ARE EXEMPT FROM RESTRICTION UNDER THE DECREE*

The Special Master correctly concluded that ordinary and usual municipal use in Wyoming and Colorado is exempt from any present restriction under the Decree as well as from any scrutiny in an action brought under Paragraph XIII(c). Thus, even if Nebraska were allowed to proceed to trial on her claim against Deer Creek Reservoir, that claim could not extend to ordinary and usual municipal uses of the reservoir.[16] Paragraph X of the Decree provides:

16. Deer Creek Reservoir was planned to provide a municipal supply for present as well as future municipal needs. Responsible municipal water supply planning requires municipal projects to have excess

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

"This decree" plainly means the whole Decree, including Paragraph XIII(c). Therefore, an action under the retained jurisdiction of Paragraph XIII(c) to consider the effect of the construction of storage capacity on tributaries between Pathfinder and Guernsey Reservoirs cannot affect or restrict municipal uses. See Second Interim Report at 74 n.99.

The question presented in Wyoming's second motion for summary judgment is whether the uses of Deer Creek Reservoir to supply the City of Casper and other municipalities directly and by exchange, as described in the Final Environmental Impact Statement for Deer Creek Reservoir (Docket No. 84a), are exempt under Paragraph X of the Decree. Nebraska concedes that ordinary and usual municipal use is within Wyoming's apportionment under the Decree. Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States' Motions for Summary Judgment at 6-7 (Docket

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capacity over present needs if the municipality is to be able to provide for future growth as it occurs. *See Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876 (1914); *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939). The original plans for Deer Creek Reservoir allowed leasing some of the storage water for non-municipal uses temporarily until the full municipal demand for the reservoir developed. Affidavit of Michael K. Purcell, ¶4, [First] Motion of the State of Wyoming for Summary Judgment at 27 (Docket No. 23). The Special Master found the question of whether such interim use would violate Nebraska's apportionment under the Decree to be a disputed issue for trial. First Interim Report at 31-32.

No. 375). However, she has raised various challenges to the economic feasibility and relative efficiency of Deer Creek Reservoir, questions about Wyoming's motives in pursuing Deer Creek Reservoir and speculation about the future administration and operation of Deer Creek Reservoir. The Special Master recommends that the Court authorize him to hold a trial on such issues.

To adopt the Special Master's recommendation would involve the Court in matters of planning, policy and water administration that are better left to the individual states and municipalities within those states. Moreover, the issues that Nebraska raises are immaterial to the correct interpretation and application of Paragraph X. The plain intent of Paragraph X can be carried out simply by asking whether the proposed municipal use is ordinary and usual in comparison to uses commonly supplied by other municipalities in the North Platte basin in Nebraska, Wyoming and Colorado. Such an approach would provide an objective standard for giving effect to Paragraph X in an action to enforce the Decree.

The Special Master articulated a similar approach as only the first of various issues he would explore at trial.

> First, I will examine the mix of uses to be supplied — residential, commercial, industrial, and so forth — and then determine whether that mix can reasonably be characterized as "municipal" under Colorado, Wyoming and Nebraska water laws.

Second Interim Report at 88. A trial is not necessary to apply the ordinary and usual municipal use standard. No genuine dispute of material fact has been raised in this regard. Neither the United States nor Nebraska even

alleged that the mix of uses made by Casper and the other municipalities to be served by Deer Creek Reservoir are out of the ordinary in any way. The only affidavits addressing the subject are in complete agreement. *See* Affidavit of Bern S. Hinckley, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, Nebraska's Motion for Partial Summary Judgment (Docket No. 296).

The following facts are undisputed concerning Wyoming's proposal to build Deer Creek Reservoir:

(1) The proposed Deer Creek Reservoir will supply water to the City of Casper, Wyoming and other smaller municipalities along the North Platte River in Wyoming.[17] Affidavit of Michael K. Purcell at ¶4, [First] Motion of the State of Wyoming for Summary Judgment at 27 (Docket No. 23).

17. Because Deer Creek enters the North Platte downstream of the City of Casper and some of the other municipalities to be served by the reservoir, water will be delivered by exchange. For example, Deer Creek Reservoir will deliver water to the North Platte River via Deer Creek in exchange for equivalent depletions by the City of Casper upstream. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). Nebraska raised the argument in briefs and in oral argument that such an exchange results in the delivery of water from Deer Creek Reservoir to irrigators downstream on the North Platte thereby raising a factual issue as to whether such use is "municipal use". Such arguments of counsel cannot create material issues of fact for the purpose of avoiding summary judgment. *See*, Fed.R.Civ.P. 56(e). The only sworn statement in the record on the matter is the affidavit of the Wyoming State Engineer which establishes that such exchanges are commonly practiced in Wyoming and throughout the West and merely constitute an efficient means of delivering water without the need to construct pipelines or other conveyance facilities. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294).

(2) The types of uses supplied by Casper and the other Wyoming municipalities to be served by Deer Creek Reservoir are like those supplied by Nebraska municipalities in the North Platte basin. Affidavit of Bern S. Hinckley at 2-4, ¶¶ 2-7, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, Nebraska's Motion for Partial Summary Judgment at 3 (Docket No. 296).

Those undisputed facts establish that the proposed municipal uses of Deer Creek Reservoir are ordinary and usual uses within the plain meaning of Paragraph X and no trial is necessary. However, the Special Master recommends the taking of evidence on a number of other issues that are both immaterial and inappropriate for the Supreme Court. For example, he would "take evidence on the need for additional supplies to meet municipal uses" and would examine whether the Deer Creek Project "represents a reasonably efficient use of water." Second Interim Report at 88.

The Wyoming Water Development Commission has spent many years and millions of dollars studying Deer Creek Reservoir as the preferred alternative to supply the municipal needs in Wyoming's North Platte basin reasonably into the future. Second Affidavit of Michael K. Purcell at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). The Deer Creek Project has undergone intensive study by the United States Army Corps of Engineers. After completing an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. §§4321-4361 (1990), consultation with the U.S. Fish and Wildlife Service under §7 of the Endangered Species Act, 16 U.S.C. §1537 (1990), and public interest review under §404 of the Clean Water

Act, 33 U.S.C. §1344 (1990), the Army Corps of Engineers issued Wyoming a permit to build Deer Creek Reservoir (Docket No. 84a). The Supreme Court should not assume the policy, planning and administrative functions of state and local governments and the federal agencies in the name of enforcing the municipal exemption in the Decree. Applying Paragraph X does not require the Court to decide whether Wyoming made a wise choice in the selection of Deer Creek Reservoir as the preferred solution to her municipal water supply needs.

The Special Master also recommends various inquiries to determine "whether Wyoming's proposed operations and its contemplated water rights administration in connection with the proposed project will be fair and equitable to affected water users in Nebraska." Second Interim Report at 86; *see also id.* at 88-89. If the Special Master's recommendation were accepted, Paragraph X would serve no purpose because the Court would engage in a new weighing of the equities to determine the proper equitable apportionment each time Wyoming or Colorado proposes a new municipal use. Nebraska's claim for an interstate priority system to protect senior appropriative rights in Nebraska was litigated in the original proceeding. The Court adopted Special Master Doherty's recommended Decree including Paragraph X and denied Nebraska's claim for an interstate priority system. To now hold a trial on the question of whether the enforcement of Paragraph X by its terms would result in "inequitable treatment of holders of senior Nebraska appropriative rights" (*Id.* at 86) would be to relitigate matters that were decided in the original proceeding.

Nebraska and the United States raise the spectre that Wyoming might operate Deer Creek Reservoir in the

future in some manner that is inconsistent with the Decree or inequitable to Nebraska. The Court should not assume that Wyoming will operate Deer Creek Reservoir under the guise of a municipal use to circumvent the decreed apportionment.[18] If Wyoming should do so, Nebraska will have recourse under the Court's retained jurisdiction, including, if necessary, an action under Paragraph XIII(f) of the Decree to modify or reconsider the application of Paragraph X. The Court in this case is called upon not to reconsider Paragraph X, but to interpret and apply it by its terms. *See* Transcript of Hearing March 9, 1992 at 27-28 (Docket No. 435) (where counsel for Nebraska confirmed that the petition presently before the Court does not seek reconsideration of the Decree under Paragraph XIII(f)); Second Interim Report at 74 n.99.

Wyoming has indicated that, even if interim, non-municipal uses of Deer Creek Reservoir were ultimately disallowed and use of the reservoir were strictly limited to a supply for the usual municipal needs of the City of Casper and other municipalities, she would build and operate the reservoir under such limits. Second Affidavit of Michael K. Purcell, Wyoming Second Motion for Summary Judgment (Docket No. 294). The Court's ruling at this juncture should give Wyoming that option.[19] Further

18. When the United States raised similar concerns about Nebraska's future administration of water rights under the Decree, the Court said:

> We cannot assume that Nebraska will undertake to circumvent the decree . . . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Nebraska v. Wyoming, 325 U.S. at 628-29.

19. The Court long ago recognized the importance of supplying water for domestic and municipal uses. *Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931).

delay is extremely prejudicial to Wyoming as construction costs escalate and the municipalities that would use Deer Creek Reservoir are forced to look for alternative supplies at additional expense. Second Affidavit of Michael K. Purcell, *id.* Even if the Court decides that there is a triable issue of fact with respect to non-municipal uses, it should confirm Wyoming's right under Paragraph X to build and operate the reservoir for municipal uses.

VI. *NEBRASKA AND THE UNITED STATES ARE NOT ENTITLED TO SUMMARY JUDGMENT CONFIRMING A PRIORITY WATER STORAGE RIGHT FOR THE INLAND LAKES*

The Special Master was unclear about the basis on which he found a December 6, 1904 priority for storage of natural flow in the Inland Lakes. When he denied Wyoming's first motion for summary judgment, he characterized the Inland Lakes issue as:

> Whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, . . .

First Interim Report at 19. These simple questions of law are presented for decision in the second round of summary judgment motions.[20] The Special Master did not find

20. The only issue raised in the pleadings accepted by the Court is whether the actions of Wyoming in seeking a determination of any Inland Lakes water right violates the Decree. That issue of course turns on whether the Inland Lakes have a water right *under the Decree*. However, the parties followed the Special Master's formulation of the issues and also submitted their documentary evidence on the issue of whether the Inland Lakes have a priority under state law.

a priority under state law or under the Decree. However, instead of recommending an answer to the legal questions presented, he recommends that the Decree be modified to include an Inland Lakes priority based on "equitable considerations." Second Interim Report at 34-35.

The Special Master also recognizes that the only issue decided in the original proceeding with respect to the Inland Lakes was that historical storage in the lakes should be taken into account in determining the water requirements of the Interstate Canal. Second Interim Report at 27 n.40. However, that fact has significance to the apportionment only if, as Wyoming asserts, the determined water requirements of the Interstate Canal and the other Guernsey Dam to Tri-State Dam canals are the measure and the limit of Nebraska's apportionment. If the Court decides to go beyond the simple legal question of the existence of a priority under state law or the Decree and to consider in this proceeding whether to modify the Decree to create an Inland Lakes water right, Nebraska's burden would be to prove that the lack of a water right under the Decree will result in shortages to the water requirements that are the basis of Nebraska's apportionment. Nebraska has not met that burden.

A. *It is Undisputed That the Inland Lakes Have No Water Storage Right under State Law*

Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 372 (1990), which authorized the North Platte Project, unequivocally requires the United States to follow state law in acquiring water rights for its reclamation projects. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *Nebraska v. Wyoming*, 325 U.S. at 612-15, 629; *California v. United*

States, 438 U.S. 645 (1978). Wyoming presented extensive documentary evidence before the Special Master showing that the United States never acquired a water storage right under state law for the Inland Lakes. Wyoming's evidence also showed without dispute that the United States officials were at all times aware of, and acknowledged, the fact that the Inland Lakes possessed no water right under state law.[21]

21. The Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334) at 47-87 contains a detailed review of the historical, documentary evidence concerning the Inland Lakes. Copies of most of the relevant documents are included in the appendix to that brief. Those documents show that both before and after the litigation in the original proceedings, government officials acknowledged that the Inland Lakes had no water storage right under state law. Correspondence between United States officials and the Wyoming State Engineer in 1913 acknowledged that "no application for a permit to build these reservoirs has been filed in this state." Appendix to Wyoming Brief in Response . . . at C-29 to C-32, C-38 to C-58 (Docket No. 334), also Appendix to Nebraska's Brief in Support of Motion for Partial Summary Judgment at A-33 (Docket No. 296). In 1925, government officials acknowledged the lack of a state water right permit but concluded it did not matter because the United States owned all unappropriated water in the river, a theory the United States later tried and lost in *Nebraska v. Wyoming,* 325 U.S. at 611-16. Counsel for the United States acknowledged at the time of the original proceeding that "The Bureau has not complied with State laws respecting Lake Alice and Lake Minatare." Appendix to Wyoming Brief in Response . . . at C-172 (Docket No. 334). The decision to intervene in the original proceedings in order to argue that the United States owned all the unappropriated water in the river was intended in part to solve the Inland Lakes dilemma:

> The only answer is an allotment to the United States for its reservoirs separate from the allotment to the states. But more sad is the picture of Lake Alice and Lake Minatare in Nebraska. The United States has no Nebraska or Wyoming filing for these reservoirs.

April 10, 1938 Letter to Chief Counsel Cheadle from District Counsel W. J. Burke, Appendix to Wyoming Brief in Response . . . at C-166 (Docket No. 334).

The Special Master recognizes that the Inland Lakes were never awarded a separate water storage permit under Wyoming law, but he says that fact is "immaterial to whether the Inland Lakes ultimately enjoy a 1904 priority right." Second Interim Report at 32. Referring to the United States' argument that the Inland Lakes possess a priority under state law, he notes:

> The United States acknowledges that the Inland Lakes priority may not have been obtained by the "traditional route" but stresses that the interstate nature of the Inland Lakes operation and their functional significance to the overall North Platte Project made such routes unsuitable.

Second Interim Report at 30 n.45.

The problem with the United States' argument is that application for a permit from the State Engineer is the *only* route to obtain a priority under Wyoming law. *Wyoming Hereford Ranch v. Hammond Packing Co.,* 33 Wyo. 14, 236 P. 764 (1925); *Lewis v. State Board of Control,* 699 P.2d 822 (Wyo. 1985). Apparently the United States argues that a 1904 storage right exists because the Inland Lakes were originally built as part of the Interstate Canal. However, since before 1904 both Wyoming and Nebraska law have distinguished between direct flow water rights under which water can be taken directly from the stream and applied to immediate beneficial use and storage rights under which water can be diverted and stored for later beneficial use. 1903 Wyo. Sess. Laws ch. 69, *as amended by* 1907 Wyo. Sess. Laws ch. 86, §16; 1895 Neb. Laws ch. 69, §56, *as amended by* 1903 Neb. Laws ch. 120, §2, *as further amended by* 1911 Neb. Laws ch. 153, §32 (copies reproduced in the appendix to Wyo-

ming Brief in Response ... at C-5 to C-6, C-9, C-16 to C-17 (Docket No. 334)). Therefore, a separate permit was required for a storage right in the Inland Lakes. *Id.* The fact that the United States acquired a direct flow permit for the Interstate Canal has no bearing on the question of whether the United States acquired a priority for storage.

The Court recognized the necessity of a state permit when, in applying §8 of the Reclamation Act, it said that the United States "must obtain *permits and priorities* . . . in the same manner as a private appropriator." *Nebraska v. Wyoming,* 295 U.S. 40, 43 (1935) (emphasis added). The Court should rule as a matter of law that the Inland Lakes have no priority for storage of natural flow under Wyoming law.

B. *The Decree Did Not Establish a Priority for Storage of Natural Flow in the Inland Lakes*

While an interstate equitable apportionment may limit the exercise of individual water rights appropriated under state law, there is no precedent for the Court to create such an individual water right as a matter of interstate apportionment. *See, e.g., Hinderlider v. La Plata and Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). *Cf. California v. United States,* 438 U.S. 645 (1978). Nebraska argued before the Special Master that the 1904 priority she claims for the Inland Lakes was litigated and determined in the original proceeding. Second Interim Report at 29 n.43 and at 33. However, Paragraphs III and IV of the Decree, which set out the relative priorities of the federal storage rights among themselves and as to the Nebraska State Line Canals, do not mention the Inland Lakes. *See* footnote 26, 29, *infra.* When Special Master

Doherty specified the priorities of each of the federal storage reservoirs he did not mention the Inland Lakes. Doherty Report at 136. When the Court totalled the combined storage rights of the federal storage reservoirs it did not include the Inland Lakes. *Nebraska v. Wyoming,* 325 U.S. at 626-27. Such omissions dispel any notion that the Court intended to confirm a storage priority for the Inland Lakes in the original proceeding.

When the Decree was amended in 1953 to add Glendo Reservoir to Paragraph III, again the Court did not mention the Inland Lakes. The Court could not have intended to determine a priority for the Inland Lakes and yet not once, but twice, neglect to include that important provision in the Decree.

While declining to apply the principle of *res judicata* directly, the Special Master found that, as a matter of equity, Wyoming should have litigated the issue of an Inland Lakes priority in the original proceeding. Second Interim Report at 34. Such an argument ignores the principle common to western prior appropriation states that it is the duty of the water right claimant or reservoir owner to pursue adjudication of the priority for storage. Wyo. Stat. §41-4-310 (1977). *See also* Neb. Rev. Stat. §46-233 (1988 Reissue); Colo. Rev. Stat. §§37-92-301 to 37-92-306 (1990). The very relief that Nebraska sought in her original bill of complaint was "for a determination . . . of the priorities of *all appropriations* in both States." *Nebraska v. Wyoming,* 325 U.S. at 592 (emphasis added). Yet neither the United States nor Nebraska presented any claim or evidence of a priority for storage of natural flow in the Inland Lakes. The United States had carefully considered the situation of the Inland Lakes and consciously decided to assert ownership of all the

unappropriated water in the river rather than to assert some priority for the Inland Lakes. *See* footnote 21 above and documentary record cited therein.[22]

The only Inland Lakes issue that was decided in the original proceeding was that any storage in the Inland Lakes during the non-irrigation season was to be counted against the requirement of the Interstate Canal for the purpose of determining Nebraska's irrigation season apportionment of natural flow in the Whalen to Tri-State section. *See* Second Interim Report at 27 n.40. Special Master Doherty and the Court decided to reduce the irrigation season requirements of the Interstate Canal by the amount that the Inland Lakes had been able to store in the non-irrigation season. Doherty Report at 60-61; *Nebraska v. Wyoming*, 325 U.S. at 646. The fact that Special Master Doherty thought that the water requirements of the Interstate Canal would need to be adjusted in the future if the Inland Lakes realized a different amount of storage water than he assumed discredits any argument that he found a fixed amount and priority for the Inland Lakes. Doherty Report at 61 n.3.

C. *Any "Equitable Considerations" with Respect to the Inland Lakes are Questions of Fact That Cannot be Determined on Summary Judgment in this Case*

Although the Special Master's finding of an Inland Lakes priority can stand neither on state law nor on the existing Decree, he recommends that, on the ground of

22. A more detailed analysis of the *res judicata* issues with respect to the Inland Lakes and the original proceeding is found in Wyoming Supplemental Brief Regarding Summary Judgment at 1-12 (Docket No. 374).

"equitable concerns" alone, the Decree should be modified to add an injunction restraining Wyoming "from interfering with the December 6, 1904, priority right of the Inland Lakes in Nebraska to store no less than 46,000 acre-feet of natural flow water during the months of October, November, and April...."[23] Second Interim Report at 34, 110. The simple fact that the Court has not exercised its jurisdiction over an action to modify the Decree is grounds alone to reject the Special Master's recommendation.

Wyoming respectfully urges the Court to decide the issue presented in Nebraska's petition: whether Wyoming violated the Decree by seeking a determination that the Inland Lakes have no priority. However, if the Court goes beyond that issue to consider whether in equity the Decree should be modified to create an Inland Lakes storage right, there are genuine issues of material fact that preclude summary judgment. The discussion of the Inland Lakes in the Special Master's Second Interim Report reads as if a trial has already been held. The Special Master weighed the evidence before him, discounted or ignored much of the historical documentation submitted by Wyoming, and made findings of fact on the disputed evidence.[24] In doing so, he in effect held a trial on the affidavits and misapplied Fed.R.Civ.P. 56. Contrary

23. There is no basis in the record or in the law of prior appropriation for the recommendation that the Inland Lakes be afforded an apparently unlimited right to store *"no less than"* 46,000 acre-feet. Every water right must have a fixed amount so that it can be administered in relation to other water rights.

24. The Special Master notes that he "cannot help but consider" that Wyoming's motivation for bringing the Inland Lakes issue to a head in 1985 seemed to be her desire to increase the yield of the proposed Deer Creek Reservoir. Second Interim Report at 29 n.44, 33 n.51. Wyoming acknowledged that the question of an Inland Lakes priority could affect the yield of Deer Creek Reservoir. That is why the

to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 ("Evidence of the non-movant party is to be believed, and all justifiable inferences are to be drawn in his favor."), the Special Master either disbelieved or simply ignored the bulk of Wyoming's evidence disputing the key facts on which he bases his recommended ruling.

Among the many facts that the Special Master finds after weighing the evidence, a few can be distilled as forming the basis of his recommended ruling:

> The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season.
>
> * * *
>
> The Inland Lakes, as the evidence shows, have been treated throughout the century as having a December 6, 1904 priority.
>
> * * *
>
> The initial North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components. . . . This fact alone suffices to defeat Wyoming's motion. Furthermore, without priority protection for the Inland Lakes, the entire apportionment scheme for the North Platte Project could be severely disrupted.

Second Interim Report at 32-33.

Deer Creek Reservoir Environmental Impact Statement analyzed two scenarios — one with the Inland Lakes priority asserted by Nebraska and one without it (Docket No. 84a). If the prospect of building Deer Creek Reservoir was the motivation for Wyoming to finally seek resolution of the longstanding Inland Lakes dilemma, that fact could have no possible bearing on the legal question of whether the Inland Lakes possess a storage priority under the Decree.

Only one of these facts is undisputed in the record before the Court. Wyoming acknowledges that the Inland Lakes historically stored natural flow water in the non-irrigation season from available gains accruing to the river below Alcova Dam. The accounting procedure agreed to annually has allowed the Inland Lakes to accrue *up to* 46,000 acre-feet during the months of October, November and April at a rate of 910 cubic feet per second but not to exercise a priority to regulate upstream water rights. Affidavit of David G. Wilde, August 15, 1988, United States Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83); Second Affidavit of George L. Christopulos, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). That procedure has allowed the government to make use of water that would otherwise flow downstream unused. *See* Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 70-87, 90-94, 100-03 (Docket No. 334). The rest of the "facts" relied upon by the Master are no more than groundless inferences drawn from other evidence which itself is disputed.

The record repeatedly establishes the fact that, although the Inland Lakes were historically allowed to store available gains below Alcova, a priority was never once exercised or administered for the Inland Lakes.[25]

25. Deposition of David G. Wilde at 305-06, 307-08 (Docket No. 158); Deposition of Gordon W. Fassett at 49, 190-91 (Docket No. 311); Deposition of Earl Michael at 229 (Docket No. 204a); Wyoming Response to Nebraska's Second Set of Interrogatories, Nos. 36, 56, 62 and 132 (Docket No. 208); Wyoming Response to United States' First Set of Requests for Admission and Second Set of Interrogatories, Admission No. 2 and Interrogatory No. 86 (Docket No. 214); Wyoming Response to United States' Third Set of Interrogatories, No. 1 (Docket No. 215); Second Affidavit of George L. Christopulos at 3-4 and Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response . . . (Docket No. 334).

That fact plainly contradicts the Special Master's finding that the Inland Lakes have been "treated throughout the century as having a December 6, 1904, priority."[26] Second Interim Report at 32. Moreover, none of the sources cited by the Master contains a statement that the Inland Lakes were treated, i.e., operated or administered, with a 1904 priority. The Special Master apparently infers such treatment from the fact that under the annual agreements the filling of Guernsey and Glendo Reservoirs was postponed to allow available gains below Alcova to accrue to the Inland Lakes.

The record further contradicts the Special Master's finding based on the Affidavit of David G. Wilde that Nebraska's apportionment would be disrupted if the Inland Lakes were not given a 1904 priority. Second Interim Report at 33 and n.50. The Wilde affidavit did not analyze the impact on Nebraska's apportionment of denying a priority call to the Inland Lakes. It only analyzed the amount of storage in the federal reservoirs under various assumed operating scenarios including one assigning a present-day priority storage right to the Inland Lakes.[27] Finally, even if an impact on Nebraska's apportionment could be inferred from the Wilde affidavit,

26. A priority fixes the right of an appropriator to command the flow of the river relative to other appropriators. To say that a water right has been "treated" with a certain priority necessarily implies the regulation of upstream juniors to satisfy that right. The Inland Lakes have never been accorded such treatment. *See* footnote 25, *supra*. Moreover, such treatment would conflict with the order of priorities for the federal reservoirs in Paragraphs III and IV of the Decree by placing the Inland Lakes on an equal footing with Pathfinder Reservoir and ahead of the other four reservoirs.

27. Indeed Wilde could not have shown an impact on Nebraska's apportionment under the Decree in the face of Nebraska's and Wyoming's undisputed evidence showing that diversions by Nebraska appropriators in the Whalen to Tri-State reach have exceeded Doherty's determined requirements by 40,000 acre-feet on an average annual basis since 1959. Affidavit of Ann S. Bleed at ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296). *See also* Affidavit of Bern S. Hinckley at 5-7, ¶¶8-10, and related figures and tables, Wyoming Second Motion for Summary Judgment (Docket No. 294). By comparison, Wilde alleged that giving the Inland Lakes a present day priority would reduce the average annual carryover storage of the federal reservoirs by 18,200 acre-feet. Affidavit of David G. Wilde at 42, Table 12, United States' Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83).

the statements in that affidavit have been disputed. Wyoming Response to Nebraska's Second Set of Interrogatories, Nos. 18-162 (Docket No. 208); Wyoming Motion to Strike Affidavits, ¶10, filed with Wyoming Reply Brief in Support of [First] Motion for Summary Judgment at 49-51 (Docket No. 87).[28]

28. Wyoming's Motion to Strike Affidavits challenged the affidavits filed by the United States and Nebraska in response to Wyoming's First Motion for Summary Judgment on the grounds, *inter alia*, that they were immaterial to the Decree interpretation issues presented by Wyoming's motion and that they failed to comply with Fed.R.Civ.P. 56(e) which requires that such affidavits "shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence." Wyoming filed the motion to strike out of caution to preserve her objections to the unsupported statements in the affidavits. The Special Master denied Wyoming's motion as "hypertechnical" and said,

> What is presently before the Special Master is not a jury trial proceeding, but rather a summary judgment motion in a case within the Supreme Court's original jurisdiction where full factual development should not be prematurely derailed by procedural technicalities.
>
> * * *
>
> [W]here, as here, the affidavits are submitted to oppose the grant of summary judgment, opinion evidence is appropriately considered to support the existence of a disputed issue of fact.

Tenth Memorandum of the Special Master at 7-8 (Docket No. 118). The Special Master has now gone far beyond considering the disputed affidavits "to support the existence of a disputed issue of fact" and has rested his recommended resolution of the Inland Lakes issue on the speculations, opinions and legal conclusions in those affidavits. For that reason, Wyoming excepts to the denial of the Motion to Strike. See Wyoming Exception No. 5.

Further, the Special Master's finding of an impact on Nebraska's apportionment is without foundation in light of the Master's refusal to define the extent of Nebraska's apportionment. The Special Master found that the request by Wyoming and Colorado to define the extent of Nebraska's apportionment was too abstract and theoretical to decide at this stage. *See* Argument in Part III.A., *supra;* Second Interim Report at 92, 94. Nevertheless, the Special Master purports to find that material injury to the as yet undefined apportionment would result from Wyoming's desire to have the Inland Lakes water rights determined.

D. *There is No Basis for the Conclusion That Nebraska's Apportionment Includes the Right to Store Inland Lakes Water in Guernsey and Glendo Reservoirs*

The Special Master's recommendation that the Court recognize a 1904 priority to store water in Guernsey and Glendo Reservoirs for later delivery to the Inland Lakes conflicts with Paragraph III of the Decree ordering the priorities of the federal reservoirs. In fact, the storage of Inland Lakes water in Glendo or Guernsey Reservoirs has no basis in the original proceeding. Special Master Doherty's consideration of Inland Lakes winter storage in determining the irrigation season requirement of the Interstate Canal clearly contemplated only the diversion at the Interstate Canal for storage in the Inland Lakes and made no reference to storage in Guernsey or Glendo Reservoirs. Glendo Reservoir did not even exist at the time of the original proceeding.

The United States has not sought to amend the government's water rights for Glendo or Guernsey Reservoirs to subordinate those rights to storage for the Inland Lakes. Second Affidavit of George L. Christopulos at 4, ¶10, Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294). Nor does the record reveal any attempt to amend the congressional authorizations of Glendo or Guernsey Reservoirs to allow such subordination.[29]

The United States' own expert, David Wilde, admitted that the states and the United States never acknowledged a right to store Inland Lakes water in Guernsey or Glendo Reservoirs. Rather, such operation was a matter of consent by the states as part of the annual accounting agreements. Deposition of David G. Wilde at 170-73, 178-80 (Docket No. 158). *See also* Second Affidavit of George L. Christopulos at 4, ¶10, Wyoming Brief in Response to Motions for Summary Judgment . . . (Docket No. 334). Even if federal officials had asserted such a right with the acquiescence of state officials, such action beyond the scope of the officials' authority would not bind or estop the respective sovereigns. *See Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947); *Heckler v. Community Health Services,* 467 U.S. 51, 60 (1984); *Lewis v. Board of Control,* 669 P.2d 822, 828 n.4 (Wyo. 1985).

29. The Court refused to consider even the joint operation of the reservoirs listed in Paragraphs III and IV until the government's contractual obligations were amended and water right and other legal issues were resolved. *Nebraska v. Wyoming,* 325 U.S. at 632-33; *see also* ¶XIII(e). A joint operation that would include the Inland Lakes was not raised by the United States or discussed by the Court.

VII. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT GRAYROCKS RESERVOIR AND THE PROPOSED CORN CREEK PROJECT VIOLATE THE DECREE*

The basic issue concerning the Laramie River is whether the Decree excluded the Laramie River from the apportionment. If the Laramie was excluded, Nebraska's claims that the existing Grayrocks Reservoir and the proposed Corn Creek Project violate the Decree must be denied as a matter of law. Nebraska and Wyoming have agreed that Nebraska's Laramie River claims should be decided on summary judgment, but the Special Master avoided the legal issues presented in the cross-motions.

The Special Master correctly rejected Nebraska's various arguments that the Decree affirmatively apportioned water in the Laramie River to Nebraska. Second Interim Report at 40, 59. Upon concluding that the existing Decree does not apportion water in the Laramie River to Nebraska and finding no restriction in the Decree on Wyoming's use of the Laramie River, the Special Master should have recommended summary judgment denying Nebraska's claim that Wyoming's use of the Laramie River violates Nebraska's apportionment under the Decree. Instead, he has recommended that the Decree be modified to provide Nebraska a forum in the Supreme Court to enforce a 1978 settlement agreement with Basin Electric Power Cooperative (Second Interim Report at 68-69) and that he be authorized to proceed to trial on the question of whether the proposed Corn Creek Project would "disturb the delicate balance of the North Platte River." *Id.* at 71. Both recommendations go far beyond the questions of decree enforcement raised by Nebraska's petition.

A. *The North Platte Decree Excludes the Laramie River*

The Court's opinion mentions the Laramie River only briefly. *Nebraska v. Wyoming*, 325 U.S. 592-93. In plain words, the Court said,

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*, ... Those apportionments are in no way affected by the decree in this case.

Id. at 592 n.1.

The Decree in turn refers to the Laramie River only once:

> XII. This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado and the waters of the Laramie River, a tributary of the North Platte River . . .

There was no ambiguity in Special Master Doherty's exclusion of the Laramie River from his recommended apportionment. He introduced and qualified his recommendation for a decree with the following language:

> With respect to the water of the North Platte River and its tributaries, *except the Laramie River*, I recommend entry of a decree . . .

Doherty Report at 177 (emphasis added). Moreover, Special Master Doherty said that the 75/25 division of natural flow that he proposed, and that was adopted by the Court, was to apply only to water "*present in* the Whalen to Tri-State Dam section." *Id.* at 179 (emphasis added). *See also* Doherty Report at 124 ("the Laramie River . . . was in effect apportioned between Wyoming and Colorado by the decree of this Court in the case of *Wyoming v. Colorado,* 259 U.S. 419. This apportionment I find equitable so far as it touches the interest of any of the parties to this suit").

The apportionment of the Laramie River referred to by the Court in footnote 1 of the 1945 opinion in *Nebraska v. Wyoming (I)* was originally decreed in 1922. *Wyoming v. Colorado,* 259 U.S. 419 (1922), *amended,* 260 U.S. 1 (1922). In the 1930's, while the North Platte case was pending before Special Master Doherty, the Court considered an action by Wyoming to enforce the 1922 Laramie River decree against Colorado. The Court's opinion in that case defined and enforced the limits in the decree on Colorado's diversions and expressly confirmed "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries." *Wyoming v. Colorado,* 298 U.S. 573, 578 (1936). Then, in 1957, twelve years after entry of the North Platte Decree, the Court vacated the 1922 Laramie River decree and entered a new decree that increased Colorado's allowable annual diversions by almost 10,000 acre-feet and confirmed that:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado.

Wyoming v. Colorado, 353 U.S. 953 (1957).

Wyoming argued to the Special Master that these unambiguous declarations of the Court in published opinions and decrees intended to resolve important disputes among sovereign states should not be lightly dismissed. However, the Special Master, not satisfied with a "surficial plain-meaning reading of the Opinion and the Decrees", invited the parties to go "beyond the bounds of the Laramie and North Platte Decrees themselves to interpret and apply them." Second Interim Report at 44. The voluminous briefs in which the parties recounted the record underlying the Laramie and North Platte decrees ultimately afforded no clearer answer to the Special Master:

> I . . . find that a crisp result eludes me on the Laramie.

Id. at 38.

The record establishes that Nebraska sought and was denied an apportionment of Laramie River flows in the original proceeding. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 10-12 (Docket No. 294) and record cites therein. Wyoming will not retrace in this brief the analysis and discussion of the record underlying the Decree because we believe the plain language of the opinion and Decree controls. Should the Court desire to explore that matter further, Wyoming's discussion of the record of the original proceeding is found in the following briefs before the Special Master: Wyo-

ming Brief in Support of Second Motion for Summary Judgment at 6-26, 30-40, 42-47 (Docket No. 294); Wyoming Brief in Response to Motions for Summary Judgment ... at 6-13, 18-21 (Docket No. 334); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 12-27 (Docket No. 352).

A key fact conceded by Nebraska's own witnesses in the original proceeding was that the contribution of the Laramie was "negligible" in times of shortage when an apportionment was needed. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 12-16 (Docket No. 294) and record cites therein. Even though the Laramie contributed some water on a seasonal or average basis, Special Master Doherty said that the apportionment he proposed would need to operate only in times of shortage. Doherty Report at 161. So there is no contradiction between Special Master Doherty's findings about historical Laramie River contributions and his exclusion of the Laramie from the apportionment. *See* Second Interim Report at 58.

There is no basis for concluding that the Court intended to prohibit new or increased uses of the Laramie in Wyoming. The North Platte Decree imposes no restriction on Wyoming's use of the Laramie River. It requires no measuring or reporting of Laramie River diversions or uses. The Court's discussion of the competing uses and priorities in the critical Whalen to Tri-State reach contains no discussion of the then present or expected future uses of the Laramie River. *Nebraska v. Wyoming*, 325 U.S. at 637-54. Had the Court intended to assure the continued contribution of a certain amount of Laramie River water to the North Platte River, appropriate injunctions would have been included in the Decree. Even if some

continued contribution of the Laramie were assumed in the original proceeding, Nebraska cannot transform such an assumption into an injunction in the Decree. *Cf. Oklahoma v. New Mexico*, 111 S.Ct. 2281 (1991) (where the assumption that flows might pass Conchas Dam to the benefit of downstream users in Texas was held not to change the plain language of the compact which did not restrict New Mexico from enlarging Conchas Dam to hold those flows). Nebraska's position and the Special Master's recommendation rest on the untenable proposition that the Court was incapable of saying what it meant in plain words.

A fundamental principle of equity jurisprudence is that any injunction must be specific and definite so as to inform the parties enjoined as to what they are called upon to do or refrain from doing. *Gunn v. University Committee to End the War in Vietnam*, 399 U.S. 383, 388-89 (1970) ("that requirement is essential in cases where private conduct is . . . enjoined . . . . It is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state"). *See also Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). To look beyond the plain language of the Court's unambiguous decrees to determine if there is some assumption or other basis upon which to imply additional restrictions not expressly included in the decree would cloud the Court's decrees in uncertainty. Disputes would never be resolved with finality (*cf. Arizona v. California*, 460 U.S. 605 (1983)), and this Court would be embroiled in continuing litigation. The Court should give effect to the plain language of the Decree until a party shows cause to modify the Decree and properly brings an action for that purpose.

B. *The Special Master's Recommendation with Respect to Grayrocks Reservoir Would Improperly Convert a Private Agreement into an Equitable Apportionment*

In 1978, Nebraska and Basin Electric Power Cooperative ("Basin"), among others, agreed to resolve litigation over Basin's compliance with federal environmental laws in the construction of Grayrocks Reservoir and the Laramie River Electric Generating Station.[30] Before the settlement an appeal had been taken to the Eighth Circuit of a federal district court injunction halting construction of the Grayrocks Reservoir and the Laramie River Station and jeopardizing the $1.3 billion investment of Basin and its partners. Under the settlement agreement Nebraska and the other opponents withdrew all objection to construction and operation of Grayrocks Reservoir. Settlement Agreement at ¶13 (Docket No. 23). In return, Basin agreed to limit the exercise of its water rights and, if necessary, to release storage water to maintain certain flows at the mouth of the Laramie River. Wyoming was not a party to the Grayrocks litigation or to the Settlement Agreement.

In the proceedings before the Special Master, Nebraska conceded that "Grayrocks will not harm her if operated in accordance with the 1978 settlement agreement, ..." Second Interim Report at 65-66. The Special Master further found it undisputed that "Wyoming

30. The December 4, 1978 Agreement of Settlement and Compromise (cited in this brief as "Settlement Agreement") and the Stipulations of Dismissal filed in *Nebraska v. Basin Electric Power Cooperative*, No. 78-1975 and *Nebraska v. Rural Electrification Administration*, No. 78-1778 (8th Cir., Order of Remand February 27, 1979) are reproduced in the Appendix to Wyoming Brief in Support of [First] Summary Judgment Motion at A-19 to A-31 (Docket No. 23).

has so far not interfered in the operation pursuant to the 1978 settlement agreement . . . ." *Id.* at 66-67. However, the Special Master expressed the following concern:

> Wyoming has repeatedly declined my several invitations to give assurances that she will in the future support Basin's obligations to maintain flows against would-be Wyoming junior appropriators.

Id. at 67.

The Special Master's concern is with the possibility that a new Wyoming appropriator might seek to divert water from the Laramie River between Grayrocks Reservoir and the mouth of the Laramie at a time when Basin is releasing water from the reservoir for the purpose of complying with the agreement. The Special Master therefore recommends a modification of the Decree to incorporate a reference to the Settlement Agreement flows and to subject Wyoming to a suit in the original jurisdiction in aid of enforcement of that Settlement Agreement.[31]

Certainly, the Settlement Agreement does not supersede Wyoming law. Both Nebraska and Basin were aware of Wyoming law and Wyoming's position with respect to the Settlement Agreement when they entered that agreement. Basin Reply to Response of Nebraska and the United States at 28 (Docket No. 350). In fact, the possi-

31. Basin Electric Power Cooperative makes the cogent point that Nebraska's petition on its face alleges that operation of Grayrocks Reservoir itself violates the Decree and that the claim that Wyoming threatens somehow to interfere with the Settlement Agreement is a claim that Nebraska has not been given leave to assert in this action. Wyoming agrees that Nebraska's failure to raise this claim in her petition is alone ground to reject it.

bility of a new appropriator diverting water from the Laramie River was the very reason that the proposed Corn Creek Project was addressed in the Agreement. *Id.;* Settlement Agreement, ¶¶5-7 (Docket No. 23). Basin assumed the risk that new appropriations other than the Corn Creek Project might seek a permit from Wyoming to divert natural flow from the Laramie. Affidavit of Robert L. McPhail, at 2, ¶7, Appendix D to Basin Electric Power Cooperative's Memorandum in Support of Wyoming's Second Motion for Summary Judgment (Docket No. 293).

The Grayrocks Settlement Agreement embodies an obligation of a single Wyoming appropriator agreed to under the threat of a continuing injunction costing millions of dollars in construction delays. Basin Electric Power Cooperative's Memorandum in Support of Wyoming's Second Motion for Summary Judgment at 9-15 (Docket No. 293). That agreement did not effect an equitable apportionment.[32] Enforcement of any right of Nebraska under the Settlement Agreement is not a matter for the Court's original jurisdiction. *See California*

32. Nor did the Settlement Agreement secure any instream flow for endangered species habitat downstream in Nebraska. Although the possible effect on whooping crane habitat was the ground on which the lawsuit was brought against Basin, the Settlement Agreement was intended to provide water for Nebraska irrigators and money for the endangered species. *See* A. D. Tarlock, *Law of Water Rights and Resources*, §9.06[4][c], Clark Boardman Co., Ltd. (1989); Basin Electric Power Cooperative's Brief in Support of Wyoming Second Motion for Summary Judgment at 9-15 (Docket No. 293); Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). There was never any judicial determination of a need for flows from Wyoming to protect wildlife habitat in Nebraska. The basis of the district court injunction was that the federal agencies had failed even to consider under the National Environmental Policy Act, 42 U.S.C. §§4231-4361 (1990), whether Grayrocks had an impact on wildlife habitat. Moreover, at the time of the Settlement Agreement, Nebraska law did not provide for protection of instream flows. Since enactment of Nebraska's instream flow law in 1984 (Neb. Rev. Stat. §§46-2,107 to 46-2,119 (1988 Reissue)), there has been no action taken to see that the releases under the Settlement Agreement get to the wildlife habitat area.

v. Nevada, 447 U.S. 125 (1980) (holding that the Court would not exercise jurisdiction over the issue of individual title claims even though they were closely related to the boundary dispute between the states).

C. *The Corn Creek Project Cannot Violate the Decree*

Wyoming is entitled to summary judgment that the Corn Creek Project does not violate the Decree for the simple reason that the Decree excludes the Laramie River. The further factual inquiry that the Special Master recommends is designed to consider whether in equity an apportionment or reapportionment of the Laramie is warranted. The Court has not exercised its jurisdiction over such an action.

If the Court were to accept such a case, equity would bar Nebraska's claim of injury from the Corn Creek Project. As between Nebraska and Basin Electric, Nebraska agreed to a reduction in flows from the Laramie River in the amount of 22,500 acre-feet per year due to the Corn Creek Project in exchange for Basin's agreement to replace half that amount (11,250 acre-feet) "from sources in Wyoming and/or the North Platte basin in Nebraska." Grayrocks Settlement Agreement at ¶¶5-7, Appendix to Wyoming Brief in Support of [First] Motion for Summary Judgment at A-26 to A-27 (Docket No. 23). Nebraska cannot in equity now assert that a reduction of 22,500 acre-feet will violate her equitable apportionment.

The Special Master suggests that the Court should exercise jurisdiction over the ancillary and only marginally related claim, raised by Nebraska counsel at oral argument, that the treatment of Corn Creek in the Settlement Agreement may have been based on a mutual mistake of fact. Second Interim Report at 70-71. Statements of counsel are not evidence and cannot raise factual issues at the summary judgment stage anymore than "mere allegations" in the pleadings can. Fed.R.Civ.P. 56(e).[33] Whether or not there is any merit to Nebraska's new-found theory, such a claim belongs before the federal district court that approved the Settlement Agreement, not in the original jurisdiction of the Supreme Court. *Cf. California v. Nevada, 447 U.S. 125 (1980).*

CONCLUSION

Wyoming respectfully requests the Court to deny the summary judgment motions of the State of Nebraska and the United States and to grant the summary judgment motions of the State of Colorado as follows:

1. Declaring as a matter of law that the measure and the limit of Nebraska's apportionment under the Decree, and therefore of Nebraska's right to demand natural flow water from Wyoming, are the water requirements of the Nebraska canals in the Guernsey Dam to Tri-State Dam section of the North Platte River as those requirements were determined in the original proceeding;

33. *See also* Second Interim Report at 70 and n.94 where the Special Master refers to statements of counsel as "conflicting testimony." *See also id.* at 40 n.59.

2. Denying all of Nebraska's claims of Decree violations that are premised on injury to uses diverting below Tri-State Dam;

3. Declaring as a matter of law that Nebraska has failed to produce sufficient facts to warrant a trial on her claims that the construction and operation of Deer Creek Reservoir would violate the Decree or require the imposition of new injunctions on Wyoming;

4. Declaring as a matter of law that the use of Deer Creek Reservoir to supply water to Wyoming municipalities in the North Platte basin, either directly or by exchange, is exempt from any restriction under the Decree by reason of Paragraph X of the Decree;

5. Declaring as a matter of law that the Inland Lakes have no priority for storage of natural flow under state law or under the Decree;

6. Declaring as a matter of law that the Laramie River was excluded from the apportionment in the Decree and, therefore, denying Nebraska's claims that Grayrocks Reservoir or the proposed Corn Creek Project violate the decreed apportionment;

7. Dismissing with prejudice each of Nebraska's claims in the Petition for an Order Enforcing Decree and for Injunctive Relief.

Respectfully submitted,

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APPENDIX

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NEBRASKA v. WYOMING
(325 U.S. 589)

DECREE
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water

in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet		Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	—	2,227
Mitchell Irrigation District	Mitchell	195		35,000
Gering Irrigation District	Gering	193		36,000
Farmers Irrigation District	Tri-State	748		183,050
Ramshorn Irrigation District	Ramshorn	14		3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and

Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss-Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water

hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation.

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953 the State of Colorado shall not institute any

proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow

of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage

of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper

Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined

and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class 'A' pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper

end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

(October 6, 1986)

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming, and in support hereof states:

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

2. The Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree establishes restraints on storage of water in those reservoirs to protect water users in Nebraska.

3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity

on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

4. The current and imminent actions of the State of Wyoming contravene the Court's opinion and invalidate the equitable balance of the North Platte River established in the Decree.

5. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the provisions of the Decree.

6. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

7. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

8. The Court expressly retained jurisdiction to resolve the present controversy in Article XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or

modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

* * *

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . . .

* * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

WYOMING ANSWER TO PETITION, MOTION FOR LEAVE TO FILE COUNTERCLAIM AND COUNTERCLAIM

(March 18, 1987)

ANSWER

Defendant, the State of Wyoming, pursuant to the Court's order dated January 20, 1987, answers the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief as follows:

1. The allegation in paragraph 1 of the Petition is admitted, subject to the following qualifications:

(a) The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified, 345 U.S. 981 (1953) ("the Decree"), does not define the extent of Wyoming's right to use water from the North Platte River basin. The Decree does impose certain restrictions on water uses in Wyoming. Wyoming is entitled to use water beneficially from the North Platte River basin, subject only to the restrictions specified in the Decree.

(b) The apportionment of North Platte River natural flows to Nebraska provided by the Decree is only to supply the present beneficial use requirements of lands supplied by diversions at or above Tri-State Dam (including the Ramshorn Canal), up to the amount of water required by such lands irrigated at the time of the Decree. No other interests in Nebraska have any rights to natural flows of the North Platte River under the Decree.

2. The allegations in paragraph 2 of the Petition are denied. Pathfinder and Guernsey Reservoirs are operated for the benefit of lands in both Nebraska and Wyoming. The "restraints on storage" in those reservoirs (as well as Seminoe, Alcova and Glendo Reservoirs) provided by Paragraph IV of the Decree require that they be operated as junior to the priorities of the State Line Canals and the French Canal to the extent of the requirements of the Nebraska lands supplied by those canals, up to the instantaneous and seasonal diversion limitations specified in said Paragraph IV.

3. Wyoming denies each allegation in paragraph 3 of the Petition that it is "presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree". Wyoming denies that it has violated or threatens to violate the Decree in any respect. Wyoming answers further:

(a) Wyoming admits that Grayrocks Reservoir causes certain depletions of the flows of the Laramie River, but denies that such depletions violate the Decree. Wyoming states further that the water rights for Grayrocks Reservoir are administered in accordance with Wyoming law.

(b) Wyoming admits that the Corn Creek Irrigation District proposes to construct the Corn Creek Project, including diversion facilities near the mouth of the Laramie River. The project would be supplied primarily by storage water from Grayrocks and Glendo Reservoirs, and also by natural flow diversions from the Laramie River. Wyoming denies that the resulting depletion would violate the Decree.

(c) Wyoming admits that the Wyoming Water Development Commission, an agency of the State, proposes to construct Deer Creek Reservoir, a municipal storage project, on Deer Creek, a tributary of the North Platte River between Pathfinder and Guernsey Reservoirs, and that the project will cause certain depletions to Deer Creek and consequently to the North Platte River. Wyoming denies that such depletions will violate the Decree.

(d) Wyoming admits that on October 3, 1986 (before this suit was filed by Nebraska), Wyoming filed a suit on behalf of the Wyoming State Engineer against the United States in a Wyoming District Court relating to four reservoirs in Nebraska known as the Inland Lakes. The suit seeks to require the Bureau of Reclamation to comply with Wyoming law in its diversion of North Platte River natural flows in Wyoming for storage in the Inland Lakes. Wyoming denies that the filing of the lawsuit or the granting of the relief requested therein would violate Nebraska's rights under the Decree. Wyoming asserts that the Bureau of Reclamation has no right to divert natural flow water in Wyoming for storage in the Inland Lakes without the permits required by Wyoming law. Wyoming denies that its officials have taken any other action to prevent the Bureau of Reclamation's diversion of North Platte River water for storage in the Inland Lakes.

4. Each allegation in paragraph 4 of the Petition is denied.

5. Each allegation in paragraph 5 of the Petition is denied. Wyoming denies that Nebraska has made any

earnest effort to resolve the matters raised by the allegations in its Petition.

6. Each allegation in paragraph 6 of the Petition is denied.

7. Each allegation in paragraph 7 of the Petition is denied.

8. Wyoming admits the allegation in paragraph 8 of the Petition, subject to the following qualification: The relief requested in the Petition is enforcement of the existing Decree; "Nebraska does not seek to modify the Decree in any respect. . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2. In Paragraph XIII of the Decree, this Court retained jurisdiction for the purpose, *inter alia,* of enforcement of the Decree and thus has retained jurisdiction for purposes of the relief requested in this suit. The Court's jurisdiction has not been invoked for any other purpose, and the references in the Petition to the Court's retained jurisdiction for other purposes therefore are irrelevant.

9. Each and every allegation in the Petition not expressly admitted or denied is hereby denied.

AFFIRMATIVE DEFENSES

1. Nebraska's Petition does not allege facts which, if true, would establish any violation or threatened violation of the Decree.

2. Nebraska has no right to water from the Laramie River because the Laramie River was fully apportioned

between the states of Wyoming and Colorado in *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). A claim to water from the Laramie River was asserted by Nebraska and rejected by this Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that matter is *res judicata*.

3. Nebraska agreed to the construction and operation of the Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978, among Nebraska, Basin Electric Power Cooperative (the operator of Grayrocks Reservoir) and others. That agreement provided for the construction and operation of Grayrocks Reservoir. Nebraska is estopped to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates Nebraska's rights under the Decree.

4. Nebraska's claim here to water from the Laramie River was previously asserted by Nebraska in a court of competent jurisdiction. *In re Corn Creek Irrigation District*, Civil Action No. 19-460, District Court, Eighth Judicial District of Wyoming. The decree entered by that court on January 20, 1978, determined that Nebraska had no right to water from the Laramie River under the North Platte Decree or otherwise. Nebraska chose not to appeal that determination. The time for appeal has expired, and that determination bars Nebraska's claim to Laramie River water in this proceeding or any subsequent proceeding.

5. Nebraska's claim to water from the Laramie River is barred by laches.

6. The Deer Creek Project is a proposed municipal storage project to supply water for ordinary and usual

municipal purposes and consumption within the meaning of Paragraph X of the Decree. Therefore, Nebraska has no right under the Decree to complain about construction of Deer Creek Reservoir.

7. The Decree does not in any way restrict the use of water from any of the tributaries of the North Platte River below Pathfinder Dam. Therefore, the construction of Deer Creek Reservoir will not violate the Decree.

8. Nebraska's rights to natural flows under the Decree are limited to the irrigation canals specified in the Decree that supply lands in Nebraska with water diverted at or above Tri-State Dam (including the Ramshorn Canal). To the extent that Nebraska's claims here are asserted on behalf of interests other than those canals, Nebraska's claims are not cognizable under the Decree.

9. In the proceedings in which the Decree was entered, Nebraska affirmatively argued, and this Court determined, that the United States is subject to the laws of Wyoming with respect to the diversion or storage of water from sources in Wyoming. Nebraska is barred from asserting otherwise now.

10. The pending civil action regarding the Inland Lakes referred to in paragraph 3(d) of Wyoming's answer herein was initiated prior to this suit. That action was filed by Wyoming in a court of competent jurisdiction to determine the extent of the rights of the United States, a Wyoming appropriator, to divert the natural flows of the North Platte River in Wyoming for storage in the Inland Lakes. That pending action is the appropriate one to determine the water rights of the United States.

MOTION FOR LEAVE TO FILE COUNTERCLAIM

Defendant, State of Wyoming, hereby requests leave of the Court to file the counterclaim submitted herewith. The grounds for this motion are:

The Court has granted leave to Nebraska to file its Petition for an Order Enforcing Decree and for Injunctive Relief, and Wyoming has answered that Petition. The counterclaim submitted herewith would be permitted under Fed.R.Civ.P. 13(b). The Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions in this Court. Sup.Ct.R. 9.2. The counterclaim would not unduly complicate this litigation, but instead would further clarify the parties' rights under the Decree. In the interests of judicial economy and equity, Wyoming should be allowed to seek redress in this original action for Nebraska's violations of Decree.

The United States and Colorado have not filed pleadings disclosing their positions in this proceeding. Wyoming therefore reserves the right to assert claims against those parties after their status and position have been disclosed.

COUNTERCLAIM

Defendant, State of Wyoming, assert the following counterclaim against Plaintiff, State of Nebraska:

1. This Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2, of the Constitution of the United States, under Title 28, United States Code, Section 1251(a), and under Paragraph XIII of the Decree.

2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

(a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;

(b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree; and

(c) By using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

3. Nebraska's past and continuing violations of the Decree have caused and continue to cause irreparable injury to Wyoming and its citizens.

4. Wyoming has no adequate remedy at law to enforce its rights against Nebraska. Injunctive relief is necessary to enforce the Decree and to restrain further violations by Nebraska.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Defendant Wyoming prays that the Court enter an order granting judgment for Wyoming and against Plaintiff

Nebraska on each of Nebraska's claims and on Wyoming's counterclaim, and enjoining Nebraska from further violations of the Decree.

Wyoming further requests the Court to appoint a Special Master in this action. Wyoming has submitted herewith a Motion for Appointment of Special Master.

WYOMING MOTION FOR SUMMARY JUDGMENT

(September 11, 1987)

Defendant, State of Wyoming, hereby moves the Court pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56 to enter judgment for Wyoming and against Nebraska on all of the claims in Nebraska's Petition for Order Enforcing Decree and for Injunctive Relief and on part of Wyoming's counterclaim. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), modified, 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming has taken and plans to take certain actions that have violated and threaten to violate the Decree. Wyoming has filed a counterclaim alleging Nebraska violations of the Decree.

2. The pleadings herein, together with the affidavits appended to this motion, show that no genuine issue of material fact exists with respect to Nebraska's claims, and that Wyoming is entitled as a matter of law to judgment denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

3. The following facts as to the actions and proposed actions in Wyoming alleged in Nebraska's petition are the controlling facts upon which Nebraska's claims are based, and are not in dispute:

   a. The operation of Grayrocks Reservoir on the Laramie River depletes the natural flow of the North Platte River. Nebraska Petition, para. 3.a.; Wyoming Answer, para. 3(a); Affidavit of Gordon W. Fassett.

b. The construction and operation of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers, such as the proposed Corn Creek Project, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.b.; Wyoming Answer, para. 3(b); Affidavit of Gordon W. Fassett.

c. The construction and operation of storage reservoirs on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, such as the proposed Deer Creek Reservoir, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.c.; Wyoming Answer, para. 3(c); Affidavit of Gordon W. Fassett.

d. Wyoming has brought an action against the United States Bureau of Reclamation to require the Bureau to obtain Wyoming permits for diversion of North Platte waters in Wyoming to storage in the Inland Lakes in Nebraska. Nebraska Petition, para. 3.d.; Wyoming Answer, para. 3(d).

4. The question whether the actions and proposed actions in Wyoming alleged in Nebraska's petition and admitted by Wyoming in its answer violate or threaten to violate the Decree is a question of law that should be decided on summary judgment.

5. The actions and proposed actions in Wyoming alleged by Nebraska do not violate or threaten to violate the Decree, as a matter of law. Wyoming therefore

is entitled to a judgment determining that such actions do not violate or threaten to violate the Decree, and denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

6. There may be disputed issues of material fact with respect to the Nebraska violations of the Decree alleged in Wyoming's counterclaim. However, the central issue of interpretation of the Decree involves no genuine issues of material fact and may be determined as a matter of law. Wyoming requests the Court pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56(d) to enter summary judgment for Wyoming determining that the Decree affords Nebraska no right to North Platte River water except for irrigation of lands served by canals specified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal). A ruling on that pure question of law will simplify the case and narrow the issues for trial. For example, if as Wyoming contends, Nebraska's rights under the Decree are limited to those canals diverting at or above Tri-State Dam, there will be no need for the parties to undertake discovery and technical studies of the water resources and the uses of water in the lower North Platte and Platte River basins in Nebraska.

Wyoming therefore requests the Court to enter judgment for Wyoming on each of the claims in Nebraska's petition and on the legal issue raised by Wyoming's counterclaim. Wyoming requests the Court to enter judgment specifically determining as follows:

a. The Decree does not restrict Wyoming's use of water from the Laramie River.

b. This Court's previous ruling that Wyoming's use of water from the Laramie River is not restricted is *res judicata*. Therefore, Nebraska has no right to water from the Laramie River under the Decree or otherwise, and is barred from asserting any claim to the Laramie River here.

c. Nebraska is estopped, by reason of the Agreement of Settlement and Compromise among Nebraska, Basin Electric Power Cooperative and others, to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates the Decree or any rights claimed by Nebraska to the Laramie River.

d. Nebraska is estopped, by reason of the ruling of the Goshen County, Wyoming, District Court in *In Re Corn Creek Irrigation District*, Civil Action No. 19-460 (Jan. 20, 1978), to assert that construction or operation of the Corn Creek Project would violate the Decree or any rights claimed by Nebraska to the Laramie River.

e. Since the Decree does not restrict Wyoming's use of water from the tributaries of the North Platte River below Pathfinder Dam, the construction and operation of Deer Creek Reservoir would not violate the Decree.

f. The Decree affirmatively exempts ordinary and usual municipal uses from any restriction. The proposed Deer Creek Reservoir would supply water for ordinary and usual municipal uses. Therefore, the construction and operation of Deer Creek Reservoir would not violate the Decree or Nebraska's apportionment provided by the Decree.

g. Wyoming's suit pending in the federal district court to require the United States Bureau of Reclamation to obtain Wyoming permits for storage of water from sources in Wyoming in the Inland Lakes in Nebraska does not violate the Decree.

h. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief is denied.

i. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal).

WYOMING SECOND MOTION FOR SUMMARY JUDGMENT

(February 22, 1987)

The defendant, the State of Wyoming, hereby moves the Court pursuant to Sup.Ct.R. 17.2 and Fed.R.Civ.P. 56 to enter judgment for Wyoming and against Nebraska denying the claims in Paragraphs 3a, 3b and 3c of Nebraska's Petition for order Enforcing Decree and for Injunctive Relief and determining certain issues of law. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming is violating or threatening to violate Nebraska's apportionment under the Decree.

2. The pleadings herein, together with the affidavits, depositions, admissions, answers to interrogatories and documents produced in discovery, show that no genuine issue of material fact exists with respect to certain of the claims that Nebraska attempts to bring under her Petition for an Order Enforcing Decree, and that Wyoming is entitled to judgment as a matter of law denying those claims.

3. Nebraska has asserted in this case that the Decree implicitly apportioned to Nebraska a portion of the flows in the Laramie River in Wyoming. The record underlying the Decree has been made available and thoroughly reviewed and, through extensive discovery, the material facts regarding the historic interpretation and administration of the Decree have been identified. No genuine issue of material fact exists and Wyoming is entitled to

judgment as a matter of law. After full litigation of Nebraska's claims for an apportionment of the Laramie River in the earlier litigation, the Court excluded the Laramie River from the apportionment under the Decree. Therefore, Nebraska's claims that Grayrocks Reservoir (an existing project on the Laramie River) and the Corn Creek Project (a proposed project that would use Laramie River supplies) violate the Decree must be denied as a matter of law.

4. It is undisputed that Nebraska entered into an agreement with the owners and operators of the Grayrocks Reservoir in which she consented to, and withdrew all objection to, the construction and operation of Grayrocks Reservoir. The reservoir and the electric power generating plant that uses water from the reservoir were constructed and placed into operation at great expense in reliance on that agreement. As a matter of equity, Nebraska cannot now claim that operation of Grayrocks Reservoir in accordance with the Settlement Agreement violates the Decree.

5. Through discovery it has become apparent that Nebraska is attempting to assert claims to the continuation of flows in excess of her apportionment under the Decree that have passed Tri-State Dam since entry of the Decree. Specifically, Nebraska asserts a right to direct flow passing the Tri-State Dam and to return flows from diversions in excess of the water requirements of the North Platte Project Canals and the State Line Canals in Nebraska which form the basis of Nebraska's apportionment. The Supreme Court has not granted leave to Nebraska to assert such claims and, therefore, they should be denied as a matter of law. Moreover, Nebraska has no legal basis under the Decree for such claims.

6. Nebraska has asserted that the proposed Deer Creek Reservoir would violate Nebraska's apportionment under the Decree, but has failed to come forward with facts that would establish any injury to her apportionment for uses that divert at or above Tri-State Dam. Because it is apparent from the undisputed facts that Nebraska cannot meet her burden to show by clear and convincing evidence injury to her apportionment, her claims with respect to Deer Creek Reservoir should be denied as a matter of law.

7. The uses of Deer Creek Reservoir by direct delivery and by exchange to satisfy the water needs of the municipalities of Casper and other communities through their municipal water supply systems, as described in the Final Environmental Impact Statement prepared by the U.S. Army Corps of Engineers for the Deer Creek Reservoir Project, are ordinary and usual municipal uses within Paragraph X of the Decree.

8. The Special Master has already ruled that purely municipal uses of Deer Creek Reservoir are exempt under Paragraph X of the Decree. Wyoming requests the Special Master to recommend, and the Court to enter, partial summary judgment confirming that ruling. Partial summary judgment on that issue is necessary to prevent irreparable harm to Wyoming. Wyoming has been unable to commence construction of Deer Creek Reservoir even for purely municipal purposes because of the uncertainty caused by the pendency of this lawsuit.

9. Therefore, Wyoming requests the Special Master to recommend and the Court to enter partial summary judgment in favor of Wyoming as follows:

(a) Nebraska's claims that Grayrocks Reservoir and the proposed Corn Creek Project violate the Decree should be denied;

(b) Nebraska's claims that Wyoming is violating or threatening to violate the Decree should be denied to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project Canals and the Nebraska State Line Canals;

(c) The Court should confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree. If Nebraska first proves a violation of her apportionment for uses supplied by diversions at or above Tri-State Dam, then such evidence may be offered for the purpose of establishing resulting injury;

(d) Nebraska's claim that Deer Creek Reservoir would violate Nebraska's apportionment under the Decree should be denied or, in the alternative, the Court should confirm by partial summary judgment that Paragraph X of the Decree exempts the proposed municipal uses of Deer Creek Reservoir as those uses are described in the Final Environmental Impact Statement for that project.

UNITED STATES MOTION FOR SUMMARY JUDGMENT ON THE INLAND LAKES

(March 1, 1991)

The United State [sic] hereby moves for summary judgment for the United States and against Wyoming on the legal validity of the December 6, 1904 water rights of the Interstate Canal to divert natural flow out of the North Platte River in Wyoming for storage in the Inland Lakes in Nebraska or to temporarily store this water in Guernsey or Glendo Reservoir before transfer to the Inland Lakes. The validity of these water rights and operations is *res judicata* and cannot be relitigated, as is more fully explained in the accompanying brief.

NEBRASKA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(March 1, 1991)

COMES NOW the State of Nebraska, pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56, and hereby moves the Court to enter judgment for Nebraska, declaring as a matter of law that: 1) the Inland Lakes are entitled to store 46,000 acre feet of natural flow during the months of October, November, and April, with a priority of December 6, 1904, as part of Nebraska's equitable apportionment, and that actions by Wyoming to prevent the continued diversions of natural flow of the North Platte River for storage in the Inland Lakes under the priority of December 6, 1904, constitute a violation of the North Platte Decree; 2) Nebraska is entitled to all of the flows of the Laramie River over and above Colorado's and Wyoming's entitlements as set forth in *Wyoming v. Colorado,* 259 U.S. 419, 496 (1922), *modified,* 260 U.S. 1 (1922) (hereinafter *"Wyoming v. Colorado"*), as part of Nebraska's equitable apportionment under the North Platte Decree, that such flows of the Laramie River are commingled with the North Platte River and become subject to the 75%/25% apportionment between Nebraska and Wyoming, respectively, and that by past depletions and through threatened future depletions of the Laramie River, Wyoming has violated and is threatening to violate the North Platte Decree; and 3) the equitable apportionment between Nebraska and Wyoming was predicated upon adequate return flows below Tri-State Dam, derived from appropriations in the Whalen Dam to Tri-State Dam reach diverting quantities of water approximating historical averages, that unavoidable operational "waste" passing Tri-State Dam does not constitute a violation of the Decree, that storage water was not appor-

tioned by the Decree, that Nebraska can administer its equitable apportionment according to Nebraska state law, and that the Decree does not contain restrictions or limitations on diversions or acres irrigated by Nebraska appropriators. Nebraska also requests the Court to enjoin Wyoming from any actions that may interfere with Nebraska's apportionment as set forth herein. As grounds therefore, Nebraska states:

1. This is an action brought by the State of Nebraska against the State of Wyoming under the retained jurisdiction of the Supreme Court, as set forth in Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953).

2. No genuine issues of material fact exist with respect to Nebraska's claims as stated herein, and the pleadings and affidavits in support of this motion prove that Nebraska is entitled to judgment as a matter of law granting this motion and denying Wyoming's efforts to relitigate matters previously determined by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (hereinafter *"Nebraska v. Wyoming"*).

3. The following undisputed material facts with regard to the Inland Lakes support Nebraska's motion for partial summary judgment:

A. The Inland Lakes, consisting of Lake Alice, Lake Minatare, Lake Winters Creek, and Little Lake Alice, are an integral component of the North Platte Project, which has a priority date of December 6, 1904.

B. The engineering design of the North Platte Project, specifically the Interstate Canal, incorporated the Inland Lakes as storage reservoirs for natural flow during the non-irrigation season.

C. Since the inception of the Inland Lakes' operation, the Interstate Canal has supplied natural flow to the Inland Lakes during the non-irrigation season for storage and later use during the irrigation season.

D. During the original proceedings in *Nebraska v. Wyoming*, the parties litigated the use and requirements of the Inland Lakes, specifically the quantities of natural flow to be stored in the Inland Lakes during the non-irrigation season.

E. During the original proceedings in *Nebraska v. Wyoming*, the United States, Wyoming, and Colorado attempted to maximize non-irrigation season storage of natural flow in the Inland Lakes in order to reduce irrigation season demands for the Interstate Canal.

F. During the original proceedings in *Nebraska v. Wyoming*, neither the legal validity of the Inland Lakes to store natural flow during the non-irrigation season nor the priority date of December 6, 1904, as it applied to the North Platte Project, including the Inland La! s, was disputed.

G. Special Master Doherty and the Court determined that storage of natural flow in the Inland Lakes during the non-irrigation season in the amount of 46,000 acre feet should be charged against the Interstate Canal irrigation season requirement.

H. Special Master Doherty and the Court determined that the Inland Lakes were part of the North Platte Project and that the North Platte Project had a priority of December 6, 1904.

I. Special Master Doherty and the Court determined that the Inland Lakes had the right to store 46,000 acre feet of natural flow in October, November, and April.

J. Since the apportionment of the North Platte River by the Court in 1945, the Inland Lakes ownership account has accrued 46,000 acre feet of natural flow in October, November, and April, with a priority of December 6, 1904.

4. The following undisputed material facts with regard to the Laramie River support Nebraska's motion for partial summary judgment:

A. In *Wyoming v. Colorado,* the Court adjudicated the relative priorities of Wyoming and Colorado to the Laramie River, allocating 272,500 acre feet annually for the irrigation of 181,500 acres in Wyoming, and allocating 15,500 acre feet for diversion by junior Colorado appropriators.

B. During the original proceedings in *Nebraska v. Wyoming,* the Laramie River was recognized as an important tributary of the North Platte River, and the parties' respective claims to the Laramie River were litigated.

C. During the original proceedings in *Nebraska v. Wyoming,* Nebraska and Wyoming offered evidence as to the priority and quantity of irrigated acreage on the Laramie River in Wyoming. Nebraska sought to prove that certain Wyoming irrigation rights adjudicated by the Court in *Wyoming v. Colorado* should be reduced because of the failure of Wyoming appropriators to fully develop their rights with due diligence.

D. Special Master Doherty heard testimony on the validity of priorities and irrigated acreage on the Laramie River, but decided not to redetermine the adjudicated rights already established by the Court in *Wyoming v. Colorado.*

E. Wyoming, Nebraska, and the United States included the flows of the Laramie River in their determinations of available supplies of the North Platte River subject to apportionment.

F. Special Master Doherty and the Court recognized that over and above the entitlements acquired by Wyoming and Colorado in the Laramie Decree, the Laramie River materially contributed to the supply of the North Platte River in the "critical reach" between Whalen Dam and Tri-State Dam.

G. The average seasonal contribution of the Laramie River to the North Platte River from 1931 to 1940, *viz.,* 23,230 acre feet, was included in the computation for the available water supply in the Whalen Dam to Tri-State Dam reach by the Special Master and the Court in weighing the supply and demand.

H. Since entry of the North Platte Decree in 1945, Laramie River flows to the North Platte River have been apportioned 75%/25% between Nebraska and Wyoming, respectively.

5. The following undisputed material facts with regard to the Tri-State issues support Nebraska's motion for partial summary judgment:

A. Special Master Doherty and the Court considered the North Platte and Platte rivers from North Park, Colorado, to Grand Island, Nebraska, as being subject to an equitable apportionment.

B. During the original proceedings in *Nebraska v. Wyoming*, the parties introduced evidence pertaining to the hydrology of the North Platte and Platte rivers, including an analysis and quantification of return flows.

C. The evidence presented in the original litigation established that decreased diversions in the Whalen Dam to Tri-State Dam section of the North Platte River resulted in decreased return flows downstream.

D. The evidence presented in the original litigation established that reductions in return flows would result in increased priority calls against upstream users.

E. Special Master Doherty and the Court determined that with the existing regimen of the river, sufficient supplies were available below Tri-State Dam arising from return flows, unavoidable flows past Tri-State Dam, and other local supplies to alleviate the necessity of equitably apportioning the North Platte River below Tri-State Dam.

F. In order to insure adequate return flows below Tri-State Dam, appropriators in the Whalen Dam to Tri-State Dam reach of the North Platte River must continue to divert water in quantities approximating historical averages.

G. Special Master Doherty and the Court recognized that unavoidable operational "waste" would pass Tri-State Dam and be available supply for downstream uses.

H. Water passing Tri-State Dam which is unavoidable operational "waste" does not constitute a violation of the Decree.

I. Storage water was not equitably apportioned by the Court in the original proceedings in *Nebraska v. Wyoming*.

J. Special Master Doherty and the Court determined that Nebraska could administer its equitable apportionment according to Nebraska state law.

K. Neither Special Master Doherty, the Court, nor the Decree placed restrictions or limitations on diversions or acres irrigated by Nebraska appropriators.

WHEREFORE, Nebraska respectfully requests the Court to declare that the following determinations were made in the original proceedings in *Nebraska v. Wyoming*, and are therefore final and conclusive, and to enjoin Wyoming from interfering with Nebraska's apportionment:

1. The Inland Lakes enjoy a priority of December 6, 1904, for the accrual to storage of natural flow of the North Platte River in the amount of 46,000 acre feet during the months of October, November, and April.

2. The flows of the Laramie River over and above Colorado's and Wyoming's entitlements as estab-

lished by the Court in *Wyoming v. Colorado* are apportioned to Nebraska, and when such Laramie River flows are commingled with the North Platte River, such supply is incorporated in the total natural flow in the Whalen Dam to Tri-State Dam reach and apportioned 75%/25% between Nebraska and Wyoming, respectively.

3. Nebraska has an equitably cognizable interest under the North Platte Decree to return flows from North Platte waters resulting from the equitable apportionment of North Platte waters diverted at or above Tri-State Dam. The return flows and other local supplies in the North Platte River below Tri- State Dam were expressly considered in the determination of the equitable apportionment between Nebraska and Wyoming, and the Special Master and the Court recognized that the apportionment would be undermined if return flows were decreased. Unavoidable operational "waste" flowing past Tri-State Dam is not a violation of the Decree. Storage water was not apportioned by the Court. Nebraska can administer its equitable apportionment intrastate according to Nebraska law, and the Court did not restrict diversions or irrigated acreages of Nebraska appropriators.

WYOMING SECOND MOTION FOR SUMMARY JUDGMENT - INLAND LAKES

Extracted from

WYOMING BRIEF IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT OF NEBRASKA AND THE UNITED STATES

at pp. 103 to 105

(April 26, 1991)

Nebraska and the United States have failed to sustain their claim that the Decree established a storage water right for the Inland Lakes. Therefore, the Court must deny their motions for summary judgment. The Court can, however, by partial summary judgment at this time, clarify the relationship between winter storage in the Inland Lakes and Nebraska's apportionment under the Decree. The Special Master should recommend that the Court grant summary judgment as follows:

(1) Confirming that Nebraska's apportionment was based on the irrigation requirements of her lands irrigated by diversions at or above Tri-State Dam and that the irrigation season requirement of the Interstate Canal was reduced by 46,000 acre-feet of river gains below Alcova diverted for storage in the Inland Lakes during October, November and April;

(2) Confirming that Nebraska's apportionment does not entitle her to demand from Wyoming more water for the Interstate Canal than the requirements determined by the Court in *Nebraska v. Wyoming (I);* therefore, the sum of the amount of water diverted at the Interstate Canal for storage in the Inland Lakes outside the irrigation season and the amount diverted at the Interstate Canal during the irrigation season may not exceed the determined water requirement;

(3) Confirming that the Inland Lakes have no priority for storage under state law;

(4) Confirming that, to the extent the United States foregoes storage in Guernsey or Glendo Reservoirs in order to credit the first gains below Alcova to the Inland Lakes, the priority of Guernsey or Glendo Reservoirs may not be asserted to require priority regulation of other water rights in Wyoming under state law; and

(5) Confirming that the Decree does not establish a right to use Glendo or Guernsey Reservoirs to store Inland Lakes water.

COLORADO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(February 22, 1991)

Defendant, the State of Colorado, pursuant to Sup.Ct.R. 17.2 and Fed.R.Civ.P. 56, hereby moves the Court to enter judgment for Colorado and against Nebraska on the following claims in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) (the Decree). Nebraska alleges that Wyoming is violating or threatening to violate Nebraska's apportionment under the Decree. The State of Colorado is also named as a defendant in this action.

2. Through discovery it has become apparent that Nebraska is attempting to assert claims to the continuation of flows that may have passed Tri-State Dam since entry of the Decree and that are clearly in excess of her apportionment under the Decree. Specifically, Nebraska asserts a right to direct flow passing Tri-State Dam and to return flows from diversions in excess of the water requirements of the North Platte Project Canals and the State Line Canals in Nebraska which form the basis of Nebraska's apportionment. Nebraska is not entitled to assert claims for uses that do not divert at or above Tri-State Dam in an action to enforce the Decree, and the Supreme Court did not accept jurisdiction to consider modification of the Decree to enlarge Nebraska's apportionment. Therefore, such claims should be denied as a matter of law.

3. Although Nebraska's claims are ostensibly against Wyoming, Nebraska may also be asserting claims against Colorado. When asked to admit that "Nebraska's assertion of injury to uses below Tri-State Dam is based solely upon Wyoming's alleged violation(s) or prospective violation(s) of the Decree apportionment for uses above Tri-State Dam," Nebraska responded:

> Denied. Nebraska asserts that equities below Tri-State may be injured by actions of *any party* which threaten the regimen of the river created by the apportionment under the Decree. While Nebraska's petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of *any party*.

Nebraska's Answers to Colorado's First Set of Requests for Admission at 4-5, Request No. 6 (emphasis added).

4. The pleadings, depositions, answers to interrogatories, documents produced in discovery, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact with respect to Nebraska's claims to flows below Tri-State Dam and that Colorado is entitled to judgment denying those claims as a matter of law.

5. In support of this motion, Colorado relies on and adopts Argument II of Wyoming's Brief in Support of Second Motion for Summary Judgment, "Uses of Water Below Tri-State Dam."

6. Wherefore, Colorado requests the Special Master to recommend and the Court to enter partial summary judgment in favor of Colorado as follows:

a. Any claims by Nebraska that Colorado is violating or threatening to violate the Decree should be denied to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project Canals and the Nebraska State Line Canals;

b. The Court should confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam, is immaterial to proof of violation of Nebraska's apportionment under the Decree. If Nebraska first proves a violation of her apportionment for uses supplied by diversions at or above Tri-State Dam, then such evidence may be offered for the purpose of establishing resulting injury.